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ABSTRACT

These seven symposium papers examine the record of federal intervention in the workplace and focus on the forces that gave rise to federal intervention. Although a precise calculus for evaluation has not yet been designed, the presenters attempt to assess whether federal actions have served the interests of labor, management, and the public at large. Reagan administration efforts to limit the federal role are also scrutinized. The papers are "The Role of Workplace Regulation" (Ray Marshall), "Redefining Government's Role in the Workplace" (Kenneth McLennan), "Pluralism in Worker Protection" (Garth L. Mangum), "The Distortions of Cost-Benefit Analysis as a Guide to Regulatory Strategy" (Susan J. Tolchin), "The Role of OMB" (Nancy Wentzler), and "Last, But Not Final Word: Protecting American Workers" (Sar A. Levitan). (YLB)

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The Feds in the Workplace

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Conference Proceedings of The National Council on Employment Policy

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Editor

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Federal Regulation of the Workplace

An Overview

Conflicts between free market operations and the imposition of social standards relating to job acquisition, equal employment opportunities, working conditions, workers' rights, wages and income security are continuing phenomena. From Roosevelt to Carter the federal government has played an expanding role in the attempt to correct perceived market imperfections and to speed progress where market forces have moved too slowly.

The Reagan administration has attempted to diminish the federal role in aiding and protecting workers charging that federal interventions have created more problems than they have solved and that their impact has been costly and counter-productive.

This symposium of the National Council on Employment Policy examines the record of federal intervention in the workplace and focuses on the forces that gave rise to federal intervention.

Although precise calculus for evaluation have not yet been designed, the presenters attempted to assess whether federal actions have served the interests of labor, management, and the public at large. Reagan administration efforts to limit the federal role are also scrutinized.

Ray Marshall emphasizes the need to control competition in order to achieve efficient labor markets. Marshall argues that on the whole the assumptions made during the New Deal and The Great Society days about the need to regulate the workplace are still valid. He notes one major exception: in earlier days designers and administrators of federal interventions had to consider only national markets; we are now increasingly

influenced by international markets. It was also assumed in the pre-1970 world that full employment could be achieved through monetary and fiscal policies alone. In current markets new regulations are necessary that would affect the international economic system.

Marshall is concerned with the effects of regulations on economic flexibility. He believes, on balance, that government regulations improve rather than distort the imperfect market. With reference to the internationalization of world economies, he advocates minimum international standards that would guarantee the right of workers to bargain collectively, occupational safety and health standards, and regulation of multinational corporations. He does not indicate how these goals can be achieved in the present world.

As far as national regulations are concerned, Marshall argues that federal enforcement requires huge bureaucracies which would decrease economic efficiency. He advocates broad national standards while leaving enforcement to labor-management committees in the workplace.

Ken McLennan also sees the need for government intervention in the workplace. He recognizes that government intervention can both make competitive labor markets more efficient and contribute to employment stability and productivity growth. He emphasizes, however, the impact of adverse effects if government regulations are not continually revised to adjust to changing economic conditions. Having paid his respects to federal intervention, McLennan proceeds to question their current efficacy. For example, he is particularly critical of Davis-Bacon. While he sees that there might have been justification for the law in 1931, he believes it is counterproductive under today's labor conditions. Similarly, whatever need existed for a single minimum wage in 1938, he favors a dual minimum wage to encourage employers to hire more youth and to provide them with early employment experience.

McLennan seems satisfied with the progress that was made

in the past but when all is said and done, he concludes that the medicine offered by federal intervention in the workplace may be worse than the sickness it is supposed to cure. Changing metaphors, he prefers the carrot rather than the stick approach and favors tax incentives, when applicable, as a means of encouraging employers to carry out socially desirable ends.

Garth Mangum emphasizes the dynamic nature of the worker protection system. He believes that the piecemeal approach of attacking problems as they arise has served the American workforce reasonably well. It has provided marginal help and protection when problems became acute and has generally been responsive to economic needs. Contrary to McLennan's conclusion, Mangum believes the system has not lost its adaptive potential and continues to attack problems as they arise. He singles out two areas--employment-at-will and comparable worth--as new subjects of policy exploration.

Mangum is concerned that the protection system has not served the disadvantaged well because of their lack of political clout. Protection for these groups, he believes, will have to come from other sources and will not become an integral part of the worker protection system.

In light of the conflicts over government's responsibility for workplace regulation, Susan Tolchin critically examines the ability of policymakers to assess regulations on the basis of their costs and benefits. She finds this approach wanting and, in addition, subject to abuse. It is hard enough to measure the costs associated with government regulations, but benefit measurement is even more difficult. She is concerned that opponents of government regulation use cost-benefit as a "scientific" tool and as a rationalization for rejecting government responsibility for risk management. She does not believe that self-regulation in a free market is effective. She does favor cost-benefit assessment as a tool for evaluating alternative approaches to regulations but she does not believe it should be the dominant factor in determining government policies affecting the workplace.

While Susan Tolchin charges that the Office of Management and Budget is a major obstacle to effective regulation of the workplace, Nancy Wentzler argues that Executive Order 12291, which empowered OMB to review agency regulations prior to their publication, makes the regulatory process more effective and responsive to public needs. Wentzler categorically rejects the charge that OMB is a black box where potential regulations are hidden from public scrutiny and claims that, in fact, OMB is a glass house. Instead of weakening the regulatory process, OMB forces agencies to carefully justify proposed regulations and its procedures allow the public full participation in the formulation of regulations.

Finally, Sar Levitan summarizes the major federal programs affecting the workplace. He finds that these interventions have been pervasive; they affect workers from the time they prepare to enter the workplace until they retire. Clearly government intervention has not always had the beneficial impact envisioned by its advocates, but on balance, he concludes, workers are now better off as a result. The body politic has also gained as these interventions have contributed to a more stable economy and have established greater equity in the operations of American labor markets.

Levitan believes that the present federal retreat from regulation is a temporary phenomenon. An educated and affluent labor force will continue to demand protection in the workplace. The federal government will be responsive to their demands in enforcing current standards and designing new ones as market conditions and equity demand.

The Editor

The Role of Workplace Regulations

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Let me preface my comments on the role of workplace regulations by recalling the history of these regulations (especially those we put in place in the 1930's, and the assumptions behind them. The main thing I would like to do is to explore the question of whether or not these assumptions are still valid. In order to deal with this main objective, we must explore the implications for workplace regulations of some major economic and labor market changes since the 1960's; in other words, what changes we should make in our approaches to regulations because of the changed environment that we find ourselves in.

One of the basic assumptions behind most of the 1930's regulations was that competition in the labor market was not good for workers and not good for the country. It was assumed that sweatshops, child labor, inadequate attention to safety and health, and a wide range of other problems were caused by competitive labor markets. And that is pretty well established among scholars in the labor field. It was therefore assumed that greater efficiency would result from the removal of labor from competition. The people who put that theory together *most* effectively were Sidney and Beatrice Webb in their book *Industrial Democracy*. Their reasoning is reflected at least partially in the practices of some American and Japanese companies today; namely, if you take labor out of competition, you force managers to manage. In other words, they'll have to plan, they'll have to think of the future, manage more efficiently,

and not shift the cost of change, or the cost of their decisions, to the workers in the form of low wages, unemployment, hazards to their health in the workplace, and the rest.

IBM, for example, today has a full employment strategy, as do some other companies. Their reasoning is that job security strengthens management. That's the same kind of logic the Webbs used--managers have to manage because they don't have the option of laying workers off. They manage better because they're more selective in the workforce and full employment or "lifetime" employment makes it possible to rotate people into a variety of jobs. Long job tenure agreements also cause managers to be more concerned about training, because they have, in essence, taken workers out of external labor markets. They hope those employees they have paid to train spend their working lives in the company's internal labor market.

We also assumed, of course, that the unregulated labor market would lead to other problems. There was a belief in the 1930's that one of the reasons that we got ourselves into the Great Depression was excessive competition, especially in the labor market. We even wrote that into our legislation--into the National Labor Relations Act. One of the reasons that we wanted to encourage collective bargaining was because if workers didn't have the power to protect their wages, full employment couldn't be sustained.

New Deal policy makers were not just concerned about wages, however; we got the term "New Deal" from the statement by Franklin Roosevelt that we had to have "a New Deal for the forgotten people in labor and agriculture" if we wanted to have prosperity in the country. Roosevelt felt that you could never have enduring prosperity unless all major groups shared in that prosperity. We therefore would not let the competitive market alone determine wages and employment. Otherwise you get unemployment, get yourselves into a depression. A correct statement of the New Deal philosophy was that they

were concerned about the problem of the simultaneous existence of some markets that were very competitive and others that were not. And that workers were selling labor in a very competitive market but the buyers weren't very competitive on their side. Farmers sold on a very competitive market but they bought their supplies on a market that was not as competitive and that led to great trouble for farmers, which ultimately led to trouble for the whole economy.

In short, the New Deal regulations were based on the belief that unregulated market forces led to depressions, inadequate protection for workers and their families, inefficient management systems, and thwarted the development of people--which even then at least philosophers and politicians thought, or at least said, were our most valuable resources. By the end of the 1930's, there was general acceptance of the idea that the Great Depression was the culmination of unregulated market forces.

So, New Deal policy makers assumed that we needed to put a floor under the market in some cases, like minimum wages, and that we needed to have automatic stabilizers like unemployment compensation.

Later, especially during the 1960's and 1970's, it was assumed that we needed to regulate areas like occupational safety and health and pensions, because we couldn't let markets determine these things. Of course, the regulations were not based on that same kind of high wage purchasing power doctrine of the 1930's; they were based on the assumption that some things could not be left to the market. You can't let the use of cancer-causing substances be determined by whatever you do in the market. So, the consequence was regulation. Similarly, we could not let markets determine whether or not pension funds were looted or misused. To use the Webbs' term again, we needed "legal enactment" of workplace protections, as well as safety nets under people outside the workplace.

The question is: are these assumptions still valid for workplace regulation? Some critics argue that the assumptions of the

1930's or even the 1960's and 1970's are no longer valid, because conditions are very different. One of the most important differences, of course, is that we no longer have a Keynesian-type world in many respects. Keynes assumed mainly national systems. In an internationalized environment, it becomes very difficult for one country to stimulate its economy, and we have to be very much concerned about some other things that the Keynesians never worried about, such as resources, technology, and inflation.

We have to give greater consideration to various forms of flexibility. After the New Deal period, it was assumed that growth would cover adjustments at the margin, making productivity, efficiency, flexibility, and competitiveness less important. Today, that's obviously not the case. Many macro-economists assumed, before the 1970's, moreover, that a country could get full employment through monetary-fiscal policies alone. Clearly, however, in an internationalized economy, no one country is going to get full employment with monetary-fiscal policies alone--as we found out in 1977-78 and as the French found out in the early 1980's. So that kind of theoretical underpinning is questioned as a result. In the internationalized information era, there must be much greater attention to international economic coordination and institutions to make and enforce the rules for the international economic system. "Free trade" is no more likely or desirable in international than in domestic markets; a relatively open market system within the framework of transparent, negotiated rules is a practical and economic necessity. Moreover, we must now have international labor standards because it becomes more difficult to enforce national labor standards alone.

Now, to sum up, it is argued that we have to reconsider labor market regulations for the following reasons. First, in addition to the changes in the effectiveness of basic economic policy, Keynesian economic theory was important because it provided a theoretical justification and intellectual respectability

to regulation to strengthen the traditional rationale provided most systematically by the Webbs and other labor economists. We, in addition, have to be concerned about the basic premise that we could take labor out of competition. Within the country, we could do this with regulations. But in an internationalized environment, it's harder to do, because you can no longer remove labor from international competition through national regulations.

One of the arguments made these days about what's happening in Europe is that marketplace regulations and the safety nets are important reasons for the growth of long-term unemployment. When Europe had relatively rapid growth, they concealed the problems of inadequate competitiveness, productivity, flexibility, and the ability to adjust to change. Similarly, we are told that one reason the Japanese are much more competitive than either the Europeans or the Americans is they have flexibility; that instead of having a contract wage system, they have a flexible compensation system comprising wages plus bonus, and have adopted other micro, macro, and industrial policies to achieve flexibility.

The effects of a flexible compensation system is not new. In fact, the UAW proposed such a system to General Motors in the 1950's; Walter Reuther proposed that GM put everybody on salary, a guaranteed wage, supplemented by a bonus system based on company performance. As Walter Reuther put it at the time, "here we are trying to make a three-year contract and we don't know what's going to happen in three weeks. So why don't we have a wage plus a bonus that would provide flexibility to adjust to change?" However, at that time GM rejected the bonus system as incompatible with capitalism. It clearly would be easier to raise or lower a bonus than to cut wages. Of course, flexibility in either the Japanese or the American system requires much more than a flexible compensation system. It also requires the proper national economic policy and systems to promote flexible adjustments between a firm and its suppliers and within the firm—including job security and well-educated,

well-trained workers.

So, in the present environment we must be concerned about the effects of marketplace regulations on economic flexibility. In many cases we will not be able to take labor out of competition by regulations. Now, we have to change the assumption from achieving stability and security through regulation and contract alone; we must pay more attention to security and stability through productivity, flexibility, and efficiency, which leads to a different set of principles. And we have learned this in our competition with the Japanese, who have put together a system that is incredibly competitive. As you know, what's happened in the world economy is that American companies have lost some competitive position, but the big losers have been the Europeans. Japan and the "little Japans" in the Pacific have been the main winners in international competition.

Now, my own conclusion as to whether or not these changes mean the whole New Deal system--and 1960's regulations--is obsolete is a resounding *no*. The basic principles are sound. Keynesian economics makes a lot more sense than either monetarism or supply-side economics; the recovery from the 1981-82 recession clearly was a Keynesian-type recovery. It was not because the tax cut generated so much savings and investment that we got out of the recession that our misguided economic policies had brought about. Recovery came because of increased military and consumer spending and because the Federal Reserve abandoned monetarism. However, Keynesian policies have to be modified to fit the international environment--we especially must have more coordination between the U.S. and other major industrialized countries. We also must give greater attention to productivity, efficiency, and flexibility, and we need to adopt minimum international labor standards enforced through international trade rules.

With respect to workplace regulations, the basic premises are still sound. We can't let the market decide things like discrimination, unemployment, occupational safety and health,

minimum wages, child labor, forced labor, and the level of unemployment. We still need regulations to take labor out of competition in these areas. We can, of course, use market incentives wherever appropriate. Markets are among our most important institutions. We need to do whatever we can to make them more effective. Indeed, what some of us think we're doing with workplace regulations is making markets work like they're supposed to, not doing away with them. My assumption is that if you had a perfectly competitive market you wouldn't get discrimination and since we do have discrimination, we ought to eliminate it so the market will work like it is supposed to.

However, we should see to it that regulations achieve the purposes in a way that will not impair the flexibility of the system. We should have unemployment compensation and "adjustment assistance" programs, for example, but should not create disincentives for adjustment where workers have little chance of returning to their previous jobs. This assumes, of course, that we have effective adjustment programs and full employment economic policies like those this council has recommended in the past. My attitude can be summarized as follows: intervention which would distort a perfect market will improve the imperfect one we've got.

Finally, with the internationalization of the economy and a more competitive environment, we can no longer just look at regulations in the United States. We also have to consider our regulations relative to those in other countries; that's why I believe we must develop minimum international labor standards. That concept which we got the ILO to accept in 1980 should be injected into the next GATT round. This would cause labor standards to be enforced by trade rules, assuming, of course, that we eventually develop new transparent, negotiated, enforceable, international trade rules. Minimum international labor standards would help solve a lot of international problems.

That doesn't mean an international minimum wage. But what it does mean are such things as the international protection of

the right of workers to organize and bargain collectively; international standards on occupational safety and health, forced labor, and freedom of association; standards of conduct for multinational and transnational corporations; and other things that will take some of these matters out of the international marketplace. Because now all we have done is transfer the Webbs' famous inverted pyramid with workers at the bottom--from a national environment to an international environment. Companies can now whipsaw people between countries. If you don't have some international standards, you're going to have opposition to an open and expanding trade system from workers around the world, especially those in the industrialized countries.

It also seems to me that we've got to be a lot more concerned about how we protect the safety and health of workers in the workplace. We've got to be concerned about effectiveness and efficiency of regulations. It never made much sense to me, for example, to try to solve the workplace safety and health problems through detailed regulations alone. We have five million workplaces to protect with 1000 to 2000 inspectors. How many places will actually be inspected? If we really took our best shot, did everything possible with an inspection strategy, what part of the problem would we solve? How much would we reduce the probability that the worst thing that could happen to workers would happen. If you inspected a place today, for example, could somebody get killed there tomorrow? The answer is, yes, it has happened. So something's wrong. In the first place, you're never going to inspect five million places. You can't expect Congress to provide that many inspectors.

What's the answer? It seems to me the answer is a different approach--have labor-management safety and health committees in the plant, give those people the knowledge and the power to protect the safety and health of the workers at the workplace, not through detailed regulations and inspections alone. We need the regulations, of course, but they should be simplified,

strengthened by concentrating on really important issues, and supplemented by permanent labor-management safety and health committees at the workplace level. Then we could use our limited federal resources to really go after the worst offenders and to educate workers and employers through something like the New Initiative Program to help people gain the knowledge about these hazards. Then they can then use the safety and health committees to better protect themselves in the workplace. Obviously, you're not going to solve this worst case phenomenon unless there are people on the job all the time with the ability to deal with workplace safety and health problems.

One of our problems in the regulatory process in the United States, compared with every other country that I know about, with the possible exception of the United Kingdom, is that the effectiveness of our system tends to be impaired by its highly adversarial nature. We are also still making the assumption that we're back in the time when we can get security through detailed regulation, instead of trying to build consensus in the workplace in order to get better protection for workers. I see no inconsistency in a tough regulatory program for the intractable cases and a voluntary, consensus-based program for those who will develop cooperative programs.

We must also continue to pay particular attention to the effects of the safety nets on international competitiveness and flexibility. One of Europe's problems with the safety nets is that they provide limited incentive for displaced workers to go to work. Now if you can get unemployment compensation for a very long period of time, then you're not going to adjust. We ought to have an adjustment program. And that adjustment program ought to encourage adjustment, it ought not to be what we did with the so-called trade adjustment program which was mainly income maintenance, and adjustment. There ought to be incentives for people to learn new things, to move to new places, or for communities to provide jobs.

Our biggest regulatory mistake was to have 23 different

programs. One for redwoods, one for trade--you name it, and we've got 23 of them. Too much of the budget is spent trying to find out why somebody is unemployed and whether they're eligible, rather than delivering the services to all workers who have been displaced. I believe there should be one adjustment program and we ought not to try to determine why workers have been displaced. If they have been displaced we should have programs to try to put people into new income-earning opportunities.

Safety nets still are very important, despite the changes since the 1930's. But they need to be constantly re-examined, rationalized and strengthened to meet new realities as they emerge in a rapidly changing labor market.

Redefining Government's Role in the Workplace

Kenneth McLennan

Vice President, Committee for Economic Development

(The author wishes to thank Emily Andrews, Robert Barnard, Lawrence Lorber and Jessica Silver for helpful comments on this paper. The views expressed in this paper do not represent the views of CED trustees or their organizations.)

Federal regulation currently has a significant influence on labor market operations and on the conditions of employment within the workplace. Government intervention is a dynamic process. Successful government action in private markets can eventually eliminate the need for continued regulation. On the other hand, more extensive intervention may be required when the original problem proves intractable. While much of the current regulation can be justified, the specific choice of intervention technique may produce unnecessary adverse affects on costs of production or on the market's ability to allocate resources efficiently without producing any significant benefits to the work force. Selecting the appropriate government role in the workplace depends importantly on the reasons why the market fails to operate efficiently and sometimes produces workplace inequities and hazards that justify government action.

Justification for Government Intervention

Government intervention in private markets is necessary because on its own the market system has imperfections. For example, imperfect information about the demand for labor and the type of skills employers are seeking can lead to an inefficient allocation of labor resources with too many resources flowing

to some industries and not enough to others. If government can assist workers and employers to reduce the cost of acquiring labor market information, human resources are more likely to be allocated to their most productive use.

Labor markets are also imperfect because some employers (often on the basis of inadequate information or custom) discriminate in the hiring and payment of specific groups of workers. Actions by employee groups to raise wages and protect high-paying jobs requiring low to moderate levels of skill through labor supply restrictions, are also a source of labor market discrimination. Since these market imperfections mean that some workers are not hired or paid according to their potential contribution to the economic success of the enterprise (i.e., their marginal revenue product), government actions to achieve equal pay for equal work and eliminate employment discrimination on the basis of sex, race or ethnic origin are justified as legitimate means of improving the operation of labor markets. By attempting to improve labor market processes government policy can potentially increase individual opportunity and at the same time improve the economic performance of industry.

Government intervention can also attempt to improve the operation of labor markets by facilitating the movement of workers out of sectors in which demand is declining and into those sectors with growing employment because it contributes to macroeconomic policy goals of employment stability and productivity growth. This is the justification for much of our federal employment and training policy and for adjustment assistance programs.

One of the most significant advantages of the market system is that economic efficiency is achieved through strong incentives for employers to minimize costs of production, including unit labor costs. But market "failures" can occur if in the pursuit of lower costs employers can avoid incurring some of the costs normally associated with the production of goods and services.

This can be done by shifting some of the cost to a third party--such as the workers, other employers or society generally. Since it is difficult to ensure that all of the cost of industrial accidents and illness in a specific workplace are included in the employers' costs of production, government intervention in the form of occupational, health and safety policy is justified. In this instance government intervention attempts to avoid an economic outcome, which on its own the market system is likely to produce.

Even if relatively competitive labor markets do not result in any economic "failures" the market mechanism may produce an unacceptable social outcome. This is certainly the most important reason for much of the original wage and employment standards legislation affecting the employment of women and children, and for minimum wage and Davis-Bacon legislation. To some extent proposals for "pay equity" and more equal distribution of employees by race and sex within the occupational hierarchy are also motivated by the view that on its own the market system has produced, and will continue to produce, an unacceptable social outcome.

Finally, the government has also influenced the conditions of employment in the workplace in an attempt to improve social outcomes by stimulating the growth of private pensions and employer-based health insurance. This type of intervention frequently takes the form of a subsidy to the worker by excluding from the employee's taxable income the employer's annual contribution to the cost of health insurance (unlimited) and to his employee's pension plan (up to a maximum limit).

Limits of Government Intervention

Since all labor markets operate imperfectly compared to some ideal standard, it is important to have some sense of magnitude of the inefficiency or unacceptable social outcome to

compare with the cost of mounting an imperfect government intervention to remedy weakness in the market. The existence of a market failure does not justify any government action--indeed some government interventions can conceivably produce greater inefficiencies than the original market imperfection.

The current debate over the appropriate role of government intervention in the workplace involves two major issues. First, is it possible that over time the original justification for government action can disappear entirely or can the perceived problem change so substantially that a different form of intervention is necessary? In other words, when is deregulation of the labor market appropriate? Second, much of the current debate is over selection of the appropriate policy instruments given that each instrument inevitably produces a different set of tradeoffs. These issues can be illustrated with reference to selected current interventions which I believe are worthy of consideration for reform.

No attempt is made to recommend the precise nature of the reform, and even though we may be able to agree on the desirability of labor policy reform strong organized constituencies in support of current programs may, of course, make it necessary for us to live with government "failures" just as we sometimes have to accept some degree of market "failure."

Improving the Operation of Labor Markets

Process interventions which are currently candidates for possible reform include minimum wage and prevailing wage programs. The major minimum wage controversy concerns the proposal to adopt the concept of a youth differential by permitting employers to hire youths at a rate below the current rate of youths at a rate below the current minimum wage required by law. It is claimed that this will help reduce the current rate of youth unemployment by lowering the fixed cost of hiring unskilled and inexperienced youths.

Traditionally, many youths have experienced one of two quite different labor market problems. One problem is how to acquire early labor market experience. This is essentially a problem of matching the supply and demand in the youth labor market. The other problem occurs when the supply of skills offered by youths are totally deficient, even for most entry level positions.

The vast majority of unemployed youths face difficult problems as they make the transition from school to work. Most young people must acquire some basic on-the-job skills which, although not demanding in terms of skill level, do vary by type of employment. In this country most young people acquire this experience while they are in school.

Unemployment associated with the early labor market experience of looking for a first job or moving in and out of different jobs is not particularly serious for most youths. The federal government can assist local employment and educational institutions to develop informational programs and teach young people how to acquire labor market information on their own. The concepts of the youth differential has a potentially important role in assisting this group of unemployed youths. Over time the fixed costs of hiring have risen as mandated government wage taxes for social security, unemployment insurance and workers compensation have risen. The youth differential will help reduce hiring costs and if permitted on a limited basis it may make it easier for this group of youths to acquire early labor market experience.

The youth differential is unlikely to assist the relatively small proportion of youths who are unemployed because they have completely failed to acquire basic educational skills. For this group, which accounts for about one-half of the total amount of youth unemployment, the differential will do very little. Employers are likely to find it extremely difficult to provide them with any training and most employers are likely to avoid the high cost of managing young people with serious

educational and labor market problems. Public policy must look elsewhere for a solution to this serious problem.

The Davis-Bacon Act is a form of direct government intervention in the labor market which many believe is no longer necessary. The original purpose of this legislation was to prevent publicly funded contractors from using funds to hire workers at wages lower than those prevailing in the industry. In practice, the definition of prevailing wages in local geographic areas gradually came to mean union wage rates. More than one-half century ago the impetus for passage of the legislation arose when contractors constructing federal buildings were found to be importing black workers from the south to work at wage rates lower than the rates of unionized workers in Washington, D.C. In 1985 it is difficult to justify the claim that "unfair" labor market competition in the form of undercutting union wage rates would be a serious threat to trade unionism if the Davis-Bacon Act was either repealed or modified to reduce the inflationary effect of this type of legislation.

Our current adjustment assistance policies for structurally unemployed workers and the Unemployment Insurance (UI) system are examples of direct process interventions which do little to improve the operation of labor markets. Most evaluations of the specialized adjustment assistance programs suggest that at best these programs attempt to "indemnify" specific groups of workers who have lost their jobs. Many of these process interventions were established to reduce worker resistance to changes in other policies (such as lowering of tariff barriers, expanding national parks or closing inefficient public medical facilities) and assistance has almost always taken the form of temporary income maintenance in addition to any other assistance the worker may receive from unemployment insurance. Little assistance to encourage retraining or geographic relocation has been provided under these programs.

The 50-year-old UI system suffers from the same weakness. Both proponents of government intervention in labor markets

and those who advocate significant reliance on the market system's ability to reallocate labor resources are highly critical of the UI system. The UI system is a prime example of a program which no longer responds to current labor market problems even though its original design may have been quite appropriate for the type of problems facing unemployed workers when the program was enacted.

In the United States the labor force is highly mobile--occupationally, industrially, and geographically. While the UI system should continue to provide income maintenance for those experiencing spells of temporary unemployment, it should also use part of its enormous resources to encourage labor mobility as a way of adjusting to change. At the Committee for Economic Development, we have developed a number of proposals which would restructure the UI system to improve its ability to encourage workers to seek retraining and relocate in occupations and areas with expanding job opportunities.¹ We think these proposals are worthy of consideration.

What the United States needs is a general adjustment assistance policy which improves the operation of labor markets. We do not need further targeted labor market programs which are likely to increase labor market rigidities. In the United States, adjustment has occurred gradually by relying primarily on market forces to reallocate labor resources, along with a flexible system of collective bargaining through which labor and management respond to economic changes.² On the whole we have avoided the severe adjustment discontinuities typical in European countries whose governments have intervened extensively in labor markets in an attempt to avoid the adverse affects of change. Such interventions have actually retarded adaptation to change and once the inevitable adjustment is made it has resulted in much more serious long-term unemployment problems than has been typical of United States experience and it has stifled the growth of employment in European countries.

Equal employment opportunity policies also illustrate government intervention techniques which are now the subject of intense debate as the government attempts to reassess affirmative action policies. The origin of the current debate over equal employment opportunity policies is based on a fundamental difference of opinion over the goals of these policies which was never fully resolved when the government started to implement Title VII of the Civil Rights Act in the late 1960's and early 1970's.

Advocates of significant reliance on the market system were among the strong supporters of equal employment opportunity, and played a significant role in implementing these policies. In their view, if the goals of these policies were realized the labor market would operate more efficiently. Equal employment opportunity was also supported because it was consistent with the traditional societal view that individuals should be selected on the basis of merit and not denied opportunities for economic advancement on the basis of race, sex, or ethnic origin. The use of race and sex as criteria in hiring and promotion decisions was opposed by this group. Another group strongly supported equal employment opportunity, but for different reasons this group was much more concerned about equality of outcome—more equal distribution of wage levels by race and sex and an occupational distribution of workers more nearly proportional to the sex and race make-up of the local labor force.

Both these groups could support the implementation of equal employment even though the concept had a different meaning for each group. For some, implementation meant quotas, but for others it meant getting more women and minorities to the personnel office so that on the basis of their qualifications more would be hired in jobs from which they had traditionally been excluded. Twenty years ago these different perceptions of equal employment opportunity were unimportant. On the basis of race, blacks were being excluded from relatively

unskilled but high-paying jobs which, by union and management practices and custom, had been traditionally reserved for whites. Similar, and indeed more widespread, discrimination was applied to women. Given the extent of discrimination at the time, it was relatively easy for the government to develop an antidiscrimination strategy. Passage of legislation prohibiting discrimination in employment led to the development of a system for the legal processing and resolving of discrimination complaints. While this process was long and painful to the plaintiffs, it had significant symbolic value. I believe this eventually changed the way most managers, and many union leaders acted in the wage determination, hiring and promotion processes.

The part of the equal opportunity strategy which eventually had the most lasting effect on reducing employment discrimination was the requirement that employers who contracted with the government must develop "goals and timetables" (Secretary of Labor Order No. 4) as part of affirmative action (Executive Order 11246) for increasing the participation of women and minorities in jobs from which they had traditionally been excluded. Requiring most employers to develop a plan for increasing the participation of women and minorities sensitized both management and labor to the problem of current and past discrimination. Business, and especially the larger firms, improved personnel policies and generally made significant progress in reducing the most obvious forms of discrimination.

In the early 1970's it was relatively easy for the government to increase the hiring of minorities in industries requiring low to moderate levels of skill in both the public and private sectors. By the end of the 1970's, however, the nature of jobs in some industries had changed. A large proportion of jobs in the expanding service sectors, as well as many jobs in some traditionally manufacturing industries such as steel, required a higher level of skill than in the past. In order to increase the participation of minorities in occupations requiring higher skill

levels, the implementation of policy edged closer and closer to quotas.

For many semi-skilled jobs, employers used employment tests in hiring and promotion decisions. Some of these tests produced a "disparate impact" in the sense that minorities and women were less successful in passing the tests. Subsequently, some of the tests were challenged because they were poor predictors of ability to perform the job.

The government enforced affirmative action by requiring employers to either use only valid tests which were reliable predictors of ability to perform the job or meet goals and timetables for the hiring of women and minorities. The long-standing debate over the reliability of educational testing shows that despite the difficulty of designing tests which accurately predict future performance, entry tests are widely used as a criterion for measuring ability. For employers, tests were a useful technique for screening and ranking applicants for hiring and promotion, even though it is extremely difficult to design tests that are reliable predictors. Faced with the alternative of valid tests or measurable progress in hiring women and minorities, employers accepted goals and timetables as the easier way to demonstrate that they were complying with affirmative action. This option also permitted them to continue using tests in hiring and promotion decisions.

In instances when employer hiring, promotion and layoff decisions moved closer to applying quotas, employees who felt that their economic opportunities were threatened by the preference given to women and minorities charged that the way "goals and timetables" were being applied amounted to reverse discrimination. By the 1980's structural change in both the public and private sectors reduced employment growth and increased layoffs in many industries with relatively high wage levels. As competition for jobs increased and the implementation of goals and timetables moved closer to quotas, resistance to the concept became pervasive. The traditional societal view that

layoffs should be based on seniority and that hiring and pay should be based on merit became more dominant, even though it was widely recognized that salary and hiring decisions are also influenced by other factors.

The Reagan administration has correctly taken the position that the federal government cannot intervene in hiring and promotion decisions as it did in the past. This position is entirely consistent with the position of those who supported equal employment opportunity in the early 1970's because race and sex were being used to discriminate against women and blacks.

Critics of the administration claim that 20 years is not long enough to fully integrate minorities throughout all levels of the occupational structure and argue for continuation of current policies. Most minorities, however, are no longer members of homogeneous groups. We have made significant progress in reducing discrimination and many within minority communities have succeeded economically and they also believe that hiring and salary decisions should be based on merit.

Even if the concept of "goals and timetables" is continued, it is unlikely to avoid the problem of having a disproportionate number of some minority groups excluded from the more skilled and higher-paid occupations. A continuation of "goals and timetables" is likely to have little effect on the high unemployment rate and low wage levels of a significant portion of some minority groups. Reducing the high incidence of unemployment and raising wage levels of minorities is now a much more complex problem than in the 1970's, and continued intervention in the hiring and wage determination processes will not solve the problem.

At the same time, while the way goals and timetables were applied may no longer be an appropriate technique to reduce discrimination further, some form of affirmative action should be required as part of our antidiscrimination policy. The administration is seeking to overturn some existing consent

decrees by joining some labor unions in suits challenging the legality of decrees which give minorities preferential treatment in hiring and layoff decisions. These arrangements were worked out by the parties involved in previous discrimination cases and approved by the courts as a way of correcting previous discriminatory practices. Since consent decrees generally have automatic termination dates, it seems unnecessary for the government to actively intervene to overturn existing agreements.

One proposal currently under consideration is to include the provision of training of women and minorities as an optional approach to demonstrating affirmative action. This proposal, in its original form developed during the Ford Administration, may be appropriate if the employer is fairly certain that jobs will be available for successful trainees. What we now need, however, is a requirement that employers actually recruit women and minorities as candidates for employment and promotion. Through active enforcement of Title VII the government should ensure that hiring and promotion decisions are made primarily on the basis of merit and that qualified candidates are not rejected because of race or sex.

The advocates of "comparable worth" are also concerned about equality of outcome rather than equality of opportunity. While there is currently no legal basis for implementing such a concept,³ some have argued that a system of job evaluation which results in the same rate of pay for jobs of comparable worth is simply a way of reducing discrimination against women. Employment discrimination against women is still a problem but significant progress has been made. Indeed, the gender pay differential between younger men and women is much smaller than for other age groups and has been diminishing in the past few years.

Any attempt to substitute a federally-approved job evaluation process for establishing wage rates will severely distort the operation of labor markets, increase government intervention in collective bargaining and increase labor market rigidities. It

may also retard the rate of progress of women into occupations which are still dominated by men.

Comparable worth is an inefficient way to counter sex discrimination against women. Female participation rates in many higher-paying occupations are increasing rapidly. The most effective strategy for reducing continued discrimination against women is more active enforcement of the Equal Pay Act and Title VII of the Civil Rights Act.

Reforming Interventions to Achieve Employment -Related Goals

In the United States the federal government has provided employers and employees with incentives to establish employment-related programs to achieve more general social and economic goals. Incentives through the tax code were seen as a better alternative than direct government intervention involving the establishment of a major government expenditure program. This is the rationale for providing incentives for employer-based health care and pension plans.

Government incentives to employers who establish health care insurance plans for their employees are widely regarded as enormously successful. Under these incentives employers can deduct the full cost of employer-paid premiums from taxable income and employees can exclude this premium from their taxable income. The result has been rapid growth of employment-based health insurance plans with the employer picking up the major share of the cost of the insurance premiums.

The disadvantage of this intervention is that when the subsidy pays for 100 percent of the health care cost the market system's ability to allocate resources efficiently is destroyed and it leads to the unnecessary consumption of services (the moral hazard problem) and an escalation of health care costs. In this instance the government should consider modifying its intervention by limiting the extent of the subsidy so that the

employee shares a small part of the cost of health care treatment. This will encourage those negotiating employment-based health care plans to seek lower cost alternative health care services and make the consumer more responsive to price and quality of services.

The incentive for employers to establish pension plans for their employees has also been successful. The participation and vesting rates of both men and women are increasing. About half of all retirees now receive benefits from an employer-based pension. This has contributed to income of the elderly which on average is now about the same as the rest of the population.⁴

The government also intervenes directly in the workplace to protect pension plan participants from a variety of potential abuses and to improve the ability of workers to continue to acquire rights to pension benefits as they move to other jobs during their working careers. These regulations associated with the Employee Retirement Income Security Act (ERISA) have led critics to charge that current regulations are inadequate.

Several of these criticisms have been persistent but unconvincing. I would place the following issues in this category:

- (i) The need to change the "arms length" rules for investing pension fund assets to permit fund managers to pursue social goals.

Obviously some part of pension fund portfolios can be invested to finance worthy causes or avoid support of unworthy ones without seriously reducing the rate of return. But any significant attempt to pursue social investing goals will inevitably reduce the rate of return and harm the plan participants. Modification of the "arms length" rules for this purpose does not seem to be desirable.

- (ii) Require employers to contribute to the pension

fund of employees who continue to work past age 65.

The justification for this proposal is based on the need to coordinate ERISA regulations with the Age Discrimination in Employment Act. This is currently a hotly-debated feature of pension policy but its importance is highly exaggerated.

Only about 12 percent of those over 65 years old participate in the labor force and most are in relatively high-paying jobs. By custom, and in law, seniority is a permissible criterion in setting wage rates. While some workers continue to work past the age of 65 because they receive little or no income from an employer-based pension, I suspect that some of the over-65-year-old workers are being paid more than their marginal revenue product and that many employers justify this payment because the overall cost of employing them is reduced by eliminating the employers contribution to these workers' pension plans. This is not a high priority for pension policy reform. Indeed, in some cases if employers were required to contribute to the pension plan for these workers it could discourage employment of older workers.

- (iii) Employer rights when an employer terminates a pension plan and establishes a new plan.

This issue concerns only defined benefit plans which are fully funded. Under the law an employer may terminate a fully-funded defined benefit plan and start a new plan so long as the current actuarial value of the promise to pay his employees a future pension is transferred into an alternate plan (usually financed by the purchase of annuities from an insurance company). Any surplus over and above the actuarial value of the future payment to employees reverts to the employer.

It is claimed that the employees should share in this surplus. I have problems with this argument since unlike a defined contribution plan, a defined benefit plan is simply a promise to

pay a retiree a future retirement income based on a formula established under the plan.

The major issue concerning this type of plan termination is whether the employer should be able to avoid paying tax on the original contributions to the pension plan and at the same time collect the interest component on the earnings of the plan's assets. On termination, I believe these excess interest earnings should revert to the U.S. Treasury.

While this is not a high priority for pension reform, it seems unfortunate that there is no way to permit the employer to have access to the surplus assets without having to incur the cost of terminating the existing plan. If this were possible it would also avoid the natural anxiety which employees feel when the plan is terminated even though their right to a future pension is secure.

There are two major issues in pension policy which have much higher priority than the three issues just described. These are increasing employer pension plans among smaller businesses and increasing the portability of pension plans. Unfortunately, there are no easy solutions to extension of coverage and greater portability.

The growth of 401 K plans has been very rapid, and although they represent a substantial revenue loss to the U.S. Treasury they may be the type of plan which can be adopted by smaller firms. It will also be difficult to deal with the portability problem. The only current approach which I believe will help move our employer pension plans toward greater portability is to lower the vesting period from ten years to five years. Unfortunately, there is still significant opposition in both the employer and trade union communities to earlier vesting.

Protecting Individuals and Society Against the Costs
of Industrial Accidents and Diseases

The Occupational Health and Safety Act (OSHA) is my final illustration of how government failure can occur even though government action to correct market failure is justified. Since the government is most concerned about the impact of the market system on worker health and safety, its major responsibility is to establish the goals or standards of safety which employers are required to meet. Except in cases where there are large gains in economies of scale from uniform standards for safety in equipment design, the government should avoid mandating how to meet these standards. While the government can develop information programs about occupational hazards the major thrust of its intervention should be to establish safety standards for important hazards and penalize employers who fail to meet them.

Immediately after enactment of OSHA, the government developed an enormous series of detailed regulations on how production should be carried out in the workplace. Most of these regulations increased the cost of production. While many of these regulations reduced the incidence of traumatic injury the extent to which relatively unimportant working conditions were regulated seemed excessive. Many of these unimportant regulations still exist but during the Carter administration the U.S. Department of Labor's enforcement strategy started to focus only on significant hazards and inspections were targeted on firms and industries with poor safety records.

There are three broad issues related to performance standards which are central to the future direction of health and safety public policy. These issues are how the government can assess risk in determining standards, how risk management in the workplace can be improved and who should bear the cost of compensating individuals who are harmed by exposure to workplace hazards, even when industry meets the required

standards of safety.

While OSHA has an important role to play in reducing the probability that some injury or disease will affect individuals, the enabling legislation has a basic flaw. It fails to recognize that uncertainty and risk are endemic to the production of goods and services. Policy makers imply that regulators should be unconcerned about how many resources are devoted to reduce occupational accidents and diseases. Regulators are told to regulate the maximum "feasible" level for any significant health risk. In the case of the Clean Air Act, regulations have to be set to assure absolute protection against defined risks with an adequate margin of safety. Congress has never been prepared to explicitly admit that there are always tradeoffs—that there are costs as well as benefits from attempts to eliminate hazards. Consequently, regulators attempt to set maximum allowable levels of suspected carcinogens that might affect individuals 20 years later.⁵

Policy makers were unwilling to recognize that exposure to many hazardous substances was dangerous only beyond a threshold level and that it was necessary to define the threshold on the basis of sound scientific evidence. It was therefore not unusual for regulators to adopt standards as close as possible to a zero-risk standard. The Delaney amendment of the Food, Drug and Cosmetic Act, which prohibits the use of any food additive shown to cause cancer in laboratory animals, is symbolic of the trend toward zero-risk standards.

Public policy can play an important role in reducing or eliminating the most obvious physical hazards or avoid serious illnesses from worker exposure to high dosages of poisonous chemicals because science has sufficient evidence to predict the outcome with a high degree of certainty. But it is extremely difficult to predict the probability of illness from exposure to low dosages of many substances with any reasonable degree of confidence. It may take decades before science provides sufficient information to determine whether the existence of

cancer in animals from a high dose of exposure to carcinogen will eventually lead to cancer in humans who, over many years, have been exposed to low doses of the potentially hazardous substances in and out of the workplace.

In determining the specific performance goals of OSHA the government must improve risk assessment by strengthening the role of science in setting these standards. While the application of scientific and technological knowledge to production can lead to hazards, all the evidence suggests that scientific progress has contributed to rising levels of safety at the workplace.

The courts have interpreted the OSHA requirement to provide maximum feasible safety against hazards to mean that economic and technological feasibility must be taken into account. Nevertheless, in the past OSHA has occasionally favored a Delaney-like approach over risk assessment based on current scientific knowledge. In 1977 OSHA proposed generic criteria for the identification of potential carcinogens. OSHA felt that any exposure was a hazard and would have banned the use of the substance if a substitute was available. The generic classification of potential carcinogens may have been useful as an administrative tool, but it was not based on sound scientific evidence. According to the National Academy of Sciences report on hazard identification, the final rule "did not address exposure assessment and rejected the use of dose-response assessment for any purpose except priority setting."⁶

The second issue in the reform of OSHA concerns the government's role in risk management. Assuming that the OSHA performance standards are based on sound scientific evidence, the government has to determine what role it can play in the management of risk. Since it is impossible for government to inspect all potential sources of hazards the government should, whenever possible, permit business to meet performance standards. One approach to monitoring whether business is meeting performance standards is to require that compliance is verified by independent private sector auditors in much the

same way financial audits are conducted. If the audit shows that the prescribed goals have not been met, government inspectors can investigate the case and determine whether business will be granted a variance from the standard, whether alternate methods of meeting the standard are permissible or whether in fact the violation justifies the assessment penalties.

Government can play a role in assisting the private sector manage risks by increasing its funding of basic research on occupational hazards, especially those involving potential occupational diseases with long latency periods. On the basis of this scientific evidence the government can, and in fact does, publish guidelines on how to minimize adverse affects of these potential hazards. These guidelines, produced by the National Institute for Occupational Safety and Health (NIOSH), are not required to take into account the feasibility of applying the results of research. It is therefore necessary to find a way of applying the results of basic research conducted by NIOSH.

One approach to incorporating the results of basic research into workplace practices is for the government to work with industry in developing new regulations based on NIOSH guidelines. Because a wide range of health and safety practices is likely to exist within industries, government could work with industry representatives in developing "best available practices" which all firms in the industry would be asked to consider adopting over a specified period of time. Individual firms should, of course, be permitted to deviate from the industry's "best available practice" since in some cases firms may be able to develop a more cost-effective technique for their own operations.

This approach does pose the difficult legal issue of whether the "best available practice" is a voluntary standard which would undermine the existing OSHA engineering standards established by law. However, if the "best available practice" approach was used only to assist industry to meet legal standards under OSHA it would not undermine the basic enabling

legislation, although it is conceivable that employers would use compliance with the "best available practice" as a defense against future negligence suits brought to court.

The third and final major OSHA issue is how to compensate the victims of an occupational hazard and who should bear the cost of the compensation. Even if a new approach to the implementation of OSHA goals improves the scientific reliability of risk assessment and the new strategy for enforcement provides employers with an incentive to improve the management of risk by reducing the probability of injury, accidents and occupational disease will continue to cause injury to some workers.

Traditionally, the remedies available to injured workers include the workers compensation system, the disability program under social security, private life and disability insurance and the right to sue for redress under various tort theories. More recently, compensation for specific injuries has taken the form of successful political action to establish a special government program to compensate workers who have suffered from exposure to some occupational hazards.

An economically and socially efficient compensation system for injured workers should treat all with similar injuries equally, with compensation set at an amount which takes into account both the economic loss suffered by the worker and the incentive for the worker to return to the work force. The current compensation system falls far short of this principle. In some cases where injured parties have been successful in pursuing tort remedies, juries have included large awards for pain and suffering, making the plaintiff economically better off than before the injury and providing little incentive for rehabilitation. In contrast, for those who do not pursue a tort liability remedy, the award from no-fault workers compensation is sometimes insufficient to cover even economic losses. In addition, disability rates are extremely high in some sectors of the economy, even though the probability of injury is relatively low. This is the case in public employment. In contrast, other sectors with riskier

work environments have much lower disability rates.

Once a worker is disabled many employers pay for the costs of a lawyer to present the worker's case for admission to the social security disability program. The amount of compensation received by an injured worker, and whether he returns to work, depends importantly on how compensation for injury is managed within his firm and on the success of his lawyer in transferring the cost to public programs.⁷

An efficient compensation system should deter risky activities, encourage employers to reduce the probability of injury and ensure that the injured workers receive most of the total compensation expenditures. The experience-rating concept in workers compensation is an attempt to penalize employers who fail to reduce the probability of injury in the workplace by making the employer bear most of the cost of injuries. During the past decade, however, the remedy for an increasing proportion of injuries has shifted to tort law. For the mid-1970's it is estimated that workplace injuries accounted for 11 percent of product liability litigation which resulted in claims payments. Proportionately, however, workplace product liability payments amounted to 42 percent of total bodily injury payments.⁸

Under tort law an employer can be sued for negligence either on an individual or class action basis. Under this legal remedy, the connection between the injury and exposure to the workplace hazard has become increasingly remote as the manufacturer of the equipment or the substance used by the employer has been made liable for the injury. In some cases (e.g., asbestos) the occupational disease occurred 30 years after exposure, even though the higher risk of lung cancer was also due to exposure to other carcinogens (smoking?) and the product unquestionably reduced occupational hazards in other industries. The existence of multiple causes of injury and the long latency period for some illnesses raise serious questions about making the employer liable for paying compensation if he has applied sound medical and scientific knowledge in the

production of substances later found to be carcinogenic.

The shift of compensation for workplace injuries to tort law has proved extremely inefficient, highly inequitable, and in many cases has imposed costs which may outweigh the benefits. Most of the expenditures on the tort-law remedy do not go to the injured plaintiffs. The major beneficiaries are lawyers who typically receive more than half the total compensation costs (contingency fees and administrative costs). For the plaintiff, seeking a common-law remedy is like playing Russian roulette—many injured plaintiffs recover nothing, while a substantial number of uninjured plaintiffs recover large amounts.⁹ For manufacturers the growth of tort-law remedies increases insurance costs and stifles their incentive to develop new products.

Why should an employer, who is not negligent but who carries out production or supplies materials based on a risk assessment incorporating widely-accepted scientific and medical knowledge, be responsible for a hazard that causes injury to workers 30 years into the future? Increasingly, the legal system—juries, lawyers and judges—have participated in awards which make employers only remotely connected with the actual injury responsible for bearing the major portion of compensation costs. This has led to an explosive increase in litigation.

Negligent employers should be prosecuted forcefully for accidents to which they have contributed. It is also understandable for the courts to seek compensation for those affected by a tragedy, but should the court make judgments against a specific employer, even though other nonwork exposure to the hazard was likely to be a much more important contributor to the subsequent injury? It would be much more equitable and efficient if there was a procedure for allocating any contributory negligence.

This dilemma created by government's legitimate role in workplace intervention will not be easy to resolve. The tort remedy is based on common-law principles which are currently

interpreted to mean that when an accident occurs there must have been negligence and since it is not necessary to prove that negligence was intentional lawyers for the plaintiffs will, whenever possible, always pursue "deep pocket" solutions for their clients. It will therefore be difficult to legislate a reform of this costly legal strategy.

Since most believe that society has an obligation to share some of the burden for those who experience tragic workplace illnesses, labor policy reform can play some role in resolving the dilemma. In addition to better risk assessment and risk management as part of an OSHA implementation strategy, labor policy should attempt to reform our inefficient and inequitable worker compensation and rehabilitation systems so that only those who are eligible for assistance receive it and that the amount of compensation is sufficient to cover the economic loss suffered by the worker.¹⁰ The case of OSHA clearly illustrates that while market "failure" justifies government action, the way government intervenes in the workplace can produce equally undesirable results in the form of government "failures" which impose significant costs on society with no guarantee of benefits for those with legitimate claims for compensation.

Balancing Government Intervention with Market Solutions

All markets have some degree of imperfection and sometimes fail to produce optimal economic and social outcomes. Imperfection in labor markets may be a necessary condition for government intervention in the workplace, but it is not sufficient condition to justify some recent interventions. This review of current labor standards and labor market policies has shown that government intervention is frequently imperfect and can sometimes impose significant economic costs without producing any meaningful social benefits.

Since economic change is a constant process, the justification for government intervention and the choice of intervention techniques must be evaluated continuously. Current forms of federal intervention in labor markets and in the workplace are in many cases unlikely to improve the operation of labor markets in the 1990's. This review suggests that equal employment opportunity policies, adjustment assistance and unemployment insurance policies should be reformed in a way that facilitates the movement of human resources to their most productive activities.

Indirect government intervention to modify the conditions of employment through tax incentives for stimulating health insurance and private pension plans have been relatively successful. For the 1990's, current government incentives should be modified to extend health insurance to workers who are underinsured against the risk of ill health, and increase employer-sponsored pension coverage to workers who have poor access to pension benefits. At the same time policy makers should recognize that for some workers tax incentives have resulted in overconsumption of health care services and may have unnecessarily encouraged early retirement.

Government actions have been relatively successful in reducing hazards which produce traumatic injuries. At the same time, in the case of injury caused by low-level exposure to hazardous substances OSHA implementation has sometimes unnecessarily increased costs of production. Remedies to assist injured workers have often benefited workers with questionable claims to assistance and frequently done little for injured workers. The inability to integrate workers compensation, worker disability programs and rehabilitation with common-law tort remedies has contributed to an explosion in the costs of litigation. More than half the cost of common-law remedies for compensating injured workers is attributable to legal fees.

The case of OSHA is a classic example of the need for government intervention in the workplace because on its own

the market system will fail to provide protection against the risk of some types of workplace hazards. Since the mid-1970's enforcement of OSHA regulations has concentrated on the most significant courses of traumatic workplace injuries. The fact that much less attention is now given to monitoring the huge array of relatively inconsequential regulations is a move in the right direction. But government failure has continued under OSHA because policy makers have failed to recognize that when regulating low-level exposure to harmful substances the cost of eliminating all risks is extremely high. The government has also failed to develop remedies for occupational injury and disease which make employers responsible only for their negligence for failing to meet scientifically defensible standards of workplace safety. This failure to balance government intervention with market solutions has unnecessarily increased the cost of meeting desirable workplace health and safety goals. It has also harmed consumers by discouraging innovation in new products and processes without providing sufficient benefits to the workers the government is attempting to protect.

Notes

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Pluralism in Worker Protection

by

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This is a year for celebrating the 50th anniversary of significant public policy accomplishment. It is appropriate, therefore, to put the subject of worker protection in historic perspective.

Nineteen thirty-five was not a year in which new realities were confronted and contemporary problems solved. Neither was it a year of substantial progress in overcoming the deep depression which had settled upon the economy. Rather it was a year for belatedly facing up to the 70-year-old realities of an industrial age; seizing upon the disarray of opposing forces to bring into effect long needed reforms. Dealing always with a cultural lag, we had entered the industrial world encased in the institutional baggage of the long agrarian era. Enough time had to pass for industrial workers to become sufficient in number and then be catalyzed by events into an effective political coalition.

In retrospect, the package of reforms put in place by the National Labor Relations Act and the Social Security Act were remarkably well attuned to the needs and realities of the time. It is not surprising that there are stresses and strains and mismatches in those same policies and programs 50 years later.

Worker Protection Needs

But the major point in the current context is that, though the social, economic and political conditions differ markedly and the labor market of 1985 is dramatically different from that of

1935, worker protection needs have changed very little. The worker, whatever the color of his or her collar, wants and needs:

1. An ample supply of employment opportunities.
2. Assured access to those jobs.
3. The necessary prerequisites to accomplish the job, once obtained.
4. Protection against job loss combined with assurance of mobility.
5. Leverage to get a reasonable share of the proceeds of the enterprise.
6. A voice in making the rules that govern the workplace.
7. Adjudication of disputes arising under those rules.
8. A safe and healthy workplace.
9. Income maintenance during job loss.
10. Protection for dependents during temporary or permanent interruption of earning power.
11. Income maintenance when age or disability ends the earning years.

The 1935 Package

The two worker protection acts of 1935 did not fill all of those needs but made a strong stab at most of them. There was nothing in any of those acts to expand the supply of jobs. However, the work relief programs of the same period made a substantial temporary contribution. The war accompanied and followed by industrial expansion, the latter subsequently supported by policies of macroeconomic demand management, provided a more lasting base.

The Wagner-Peyser Act of 1933 made a modest contribution

to the job access problem but the obstacles of discrimination in employment and lack of job search skills were not even recognized. The Smith-Hughes Act of 1917 had expanded state-supported vocational education somewhat but education and formal training were, at the time, essential only to a very limited range of occupations. Items 4 through 8 were entrusted to collective bargaining. A floor under wages, a penalty on excessive hours and the abolition of child labor, added by the Fair Labor Standards Act as soon as the Jones and Laughlin decision proved the U.S. Supreme Court was no longer an obstacle, were extra insurance until collective bargaining could establish its sway.

State worker's compensation plans were weak encouragements to a safe workplace, but did insure income interruptions from industrial accidents. Industrial health risks were not widely recognized until much later. The Social Security Act fit the needs of items 9-11 of the two-parent nuclear families of the era remarkably well, substituting for the extended family which had provided such security in the agrarian era.

The Limited Scope of Collective Bargaining

While some of these protections were imposed by law, others were left to worker initiative. As one of the latter category, collective bargaining never met expectations. The response of employers typically had been first to fight unionism, then to attempt to coop it by company unions and finally to compete through unilaterally improved wages and working conditions. Under pressure of law, they learned to live with unions, but seldom happily. It had been assumed that most workers would prefer organization, once employers could no longer prevent it. Subsequent history did not confirm that expectation. A combination of worker apathy and employer and community resistance restrained union membership to 36

percent of the labor force at its peak. However, enhanced by employer efforts to compete, unions had wage and economic benefit influence beyond their bargaining scope. They could do little about lack of communication in nonunion settings nor could they protect jobs there. Costs of their safety efforts often put their employers at a competitive disadvantage in the product market. American workers were essentially individualistic and by and large viewed their unions as a convenient tool for meeting their needs rather than as a focus of loyalty and devotion. Unless seriously aggrieved, many found alternative means of worker protection sufficient.

The first necessity of unions is to take wages and economic benefits out of competition so as to protect the employer who grants them from disadvantage in product market competition. Hence the relative success of unions in oligopolistic industry, regulated activities and in some fragmented highly competitive industries where the union could serve as policeman to the collective advantage of employers. Unions had no control over foreign competition and little over new entrants to competitive industries when production cost differentials became wide enough. Foreign competition, government deregulation, geographical shifts in the location of production, the relative decline in the stronghold industries and technological changes reducing labor control of production and favoring never before organized groups all ate away at union power. Observing that weakness, employers counterattacked, either setting up parallel nonunion entities, pushing out unions or demanding and getting major concessions. The current eighteen percent who are union members isn't an innocuous share of the labor force, given competitive employer efforts to prevent or displace unions, but it is far from enough to satisfy worker demand for the long sought protections.

Unions could never meet the need for access to jobs, except in some casual labor markets where the unions were more stable than the employers and were the most convenient sources

for experienced labor. Otherwise, the role of the unions was to protect their incumbent members. They as well as employers had to be constrained by equal employment opportunity legislation. Unions have no power of job creation or control over job loss, though they may impede the former and can participate in making the rules by which the latter is shared. Union attempts to control a labor market coextensive with product market competition often draws attention away from establishment level concerns where safety issues must be addressed. Industrial health threats are so technical, so controversial, so in need of research and evidence and so threatening to the very survival of production processes upon which both company survival and union members' jobs depend that they can probably only be addressed by government. Employer-employee negotiations over workplace safety and health have only two advantages over a government regulatory approach: (1) superior knowledge of workplace conditions and (2) an ability to offset dangers against wages. However, a risk buyout approach is questionable public policy.

Rising Pre-Entry Skill Requirements

Most specific job training always has and always will occur in the workplace but there is a growing load of pre-entry requirements. Employers can be depended upon to meet firm-specific training requirements but be reluctant to contribute to generic training. We generally, in the United States, lack the institutional arrangements to train on an industry-wide basis for industry specific skills. That responsibility tends to be shared between individual employers and the public schools.

That education and training which is prerequisite to employability as well as for generic skills which occur across employers and industries is, of necessity, a public responsibility. We do a reasonable job for those prepared to enter, compete in

and survive the educational system. We have never done well by those who are not prepared despite nearly 25 years of remedial programs for the competitively disadvantaged. Such programs have many problems but most come under the heading of insufficient resources.

Current Issues

Job Creation

All of that history brings us to current issues. With over 8 million unemployed at or near the peak of a business cycle but with massive federal budget deficits persisting throughout the foreseeable future, there is no place to go in demand management. The deficit is, as always, a powerful economic stimulator but with prices more attractive abroad, that's where the goods-pursuing dollars have gone. The dollar pursuing services have largely stayed at home because services are more difficult to import. Protectionism can keep more of the dollars at home but cannot create significantly more jobs. First, with higher prices, each consumer dollar will buy fewer goods and therefore create fewer jobs. Secondly, U.S. exports will suffer even more as U.S. prices rise at the same time foreigners earn fewer dollars. The demand management problem may not be apparent now but wait for the inevitable downturn in the business cycle. The only long run solution is a softening of the dollar and recovery of exports. In the short run, not much can be done beyond providing income maintenance, supporting transfer to service industries and restoring transitional subsidized employment.

Job Access

Job access, as noted above, has three aspects: (1) labor market information and labor exchange services, (2) job search

assistance, and (3) equal employment opportunity enforcement. Those are in reverse order of their importance. Job Service has substantially improved in recent years its *capability* to provide labor market information and to promote employer job orders but its *ability* to deliver those services has been hamstrung by budget restrictions.¹

The provision of job search training is spreading rapidly throughout the Job Service system. I do not know what the national numbers are but my own small state of Utah ran 10,000 individuals through such sessions between July 1, 1984 and June 30, 1985. Making job search training universally available through Job Service would not be such a big step from where we are now. The great breakthrough would be to get it into the high schools, making the ability to pursue a job as pervasive as the ability to drive an automobile.

The widespread acceptance of equal employment opportunity policy is perhaps best demonstrated by the lack of enthusiasm of employers, private and public, for the Reagan administration's efforts to reverse 20 years of progress. The appropriate prescription is to continue forcefully down the enforcement track while addressing more attention to preparation for employment and to traverse the complex institutional access routes to jobs. Advocacy of newly protected groups inevitably increases the competition for those who previously had the edge but no more so than economic development efforts often add to competition for existing firms. Pay equity is a separate issue from job access, to be addressed later.

Employability Development

On the employment preparation front the priority needs are, first, to expand on what we already know about training for the competitively disadvantaged and, secondly, to be more concerned for general employability development as contrasted to specific job preparation for the oncoming youth population as a

whole. The findings of over 20 years of evaluative research have been remarkably consistent. Training programs for the disadvantaged work but require (a) longer term training for higher level jobs and (b) concentration upon those among the target populations who prove themselves willing to make the extra effort.²

A better prepared generation will demand, seek and get better job preparation and find employers more willing to invest in human resources.³ At the same time, employers might be persuaded to provide more and better industry and company-based training with a combination of aggressive promotion and modest subsidization.⁴

Protection Against Job Loss

There can be no protection against job loss in a dynamic economy--only a sharing of the pain through compensation of the losers by the winners and adjustment mechanisms to speed the transition for the displaced. Collective bargaining is the best device for determining the incidence and allocating the costs of displacement but can do little about the transitional adjustments. In the absence of collective bargaining, it is not surprising that some of the displaced appeal to the courts and that the courts respond. Employment at will is an outmoded throwback to the common law of an age dominated by landownership. Certainly workers earn some property right in their jobs by the sheer duration of service, just as the owners of capital retain property rights in their investment. The courts are not the best conceivable instrument for accommodating those conflicting rights but in the absence of an effective grievance and arbitration procedure they are the only available instrument.

The same can be said for workplace rulemaking, wagesetting and grievance adjudicating in general. Participation in those decisions is an employee right which grows with contribution to the enterprise most objectively measured by a combination of

duration of service and level of compensation. That so many have chosen to eschew the protections of collective bargaining is evidence of the inherent individualism of Americans as well as the failure of unions to generate widespread trust as dedicated servants of the employee. But unions are not sacred institutions; they are means to the ends just described. If those ends can be otherwise accomplished, why not? If management is sincere in the promotion of employee participation, that may carry the day. However, what management unilaterally giveth, management can withdraw as easily. At the very least, the risk of employment-at-will suits may force employers to give more careful consideration before exercising the right to fire. There appears also to be some impact on the number of employers who use severance pay as assurance against such suits.

Unionization and the Women's Movement

My own guess is that union membership has hit bottom and will begin to rise through endorsement of the women's movement and pursuit of pay equity. And that is the way it should be. Comparable worth can be successfully pursued through the courts only insofar as it can be demonstrably tied to intentional discrimination. The argument that court-ordered or legislated comparable worth would be an unacceptable disruption of labor market processes cannot be applied to its pursuit through collective bargaining. The market wage is only the aggregate of all of those forces impacting upon the market, including employer-employee negotiations, individual and collective. Employers have no inherent reason other than cost for opposing pay equity and pay equity costs only if it is achieved by pulling women's wages up to men's rather than each toward the other. The aggregate of all pay equity pursuits, including those through collective bargaining, adds to the offsetting costs of inequity. As pursued piecemeal over time, pay equity need not add to labor costs but will have its major adjusting impact upon the relative

rates of change of male and female wages. Thus pursuit of pay equity through the courts will probably have its major payoff through demonstration of the superiority of private decision-making. Women have never before been successful in breaking the 60 percent pay equity barrier. But then they have never been so well organized before.⁵

In addition to some resurgence for organized labor, I would predict that the rapid spread of alternative disputes resolution processes would meet some substantial amount of the worker protection needs through mediating and arbitral services outside the labor-management framework. Already, employees are being taught by the National Labor Relations Board that protection of concerted employee actions is not limited to those directed by unions.⁶

The growth of worker participation schemes, the rising court activism as demonstrated by the employment at will cases and NLRB protection of nonunion concerted activity all considered together suggest the possibility that employers who are willing to pay the price of legally binding commitments to their employees, perhaps through implied contracts in personnel handbooks, may be able to maintain a lasting nonunion environment. It sounds like a distinction without a difference but some seem to be willing to pay a high price to avoid dealing with an outside union. If such arrangements do not suffer the past fate of company unions, it will be a major departure in U.S. history. Still it is consistent with the logic of a labor policy which guarantees to workers both the right to be and not to be represented by unions. It sets up management and union as competitors for the employee's favor, keeping each competitor from abuse of confirmed power. It works only as long as there are unions strong enough and aggressive enough to be realistic threats. It would be my somewhat cynical conclusion that worker participation procedures, employee assistance plans and most of the other goodies generated by the campaign for union-free operation will survive only as long as the threat of

unionization is real.

Safe and Healthy Workplaces

It is surprising that we survived so long without the Occupational Safety and Health Act (OSHA). Workers' compensation law mercifully buried the common law employer defenses and assured reasonable compensation for income loss. They did little to promote safety. Higher insurance costs were rarely as expensive as safety measures. They did practically nothing for industrial health, the risks to which were long-term and cumulative and hard to ascertain. Collective bargaining never became sufficiently widespread for pervasive negotiated protection. The immediate attraction of more in the paycheck too often encouraged the worker tendency to take the risk that "it won't happen to me!"

Some of the initial OSHA standards may have been overly ambitious. The very magnitude of the enforcement task may account for some of the difficulties in proving the program's effectiveness. Industrial health effects may require a generation to substantiate. The single industry concentration of the Mine Safety and Health Administration makes its impact more readily measurable. Coal mine fatality rates fell consistently following the passage of MSHA then turned upward again as reduced budgets reduced enforcement.⁴ That expression may give some reassurance of ultimate statistical justification for OSHA. The voluntary compliance advocated by the present administration is obviously more desirable than adversary proceedings. But only when accompanied by the visible club of aggressive enforcement can the required negotiations be persuasive.

Income Protection

Income protection is of necessity a public responsibility with private employer provisions only supplementary. We have

done reasonably well at providing income protection against temporary work interruptions and retirement. Unemployment compensation was designed for workers of long labor force attachment and generally steady employment likely to be recalled or find a new job within a relatively short time. It still serves that worker well. It does not do well for those it was never designed for: (1) the new or recent labor force entrant, (2) the worker who wants or can find only sporadic employment, (3) the victim of long-term employment in an economically depressed area and (4) the permanently displaced worker for whom there is no longer employment opportunity for the same skills at near the same income levels. Multiple earner families are becoming the major defense against these risks with public assistance as the backstop. That combination is probably adequate for (1) and (2). The combination of a more adequately funded Job Training Partnership Act, both Titles II and III, along with unemployment insurance regulations requiring earlier recognition of minimal prospects for reemployment to be followed by development of a reemployment plan would help greatly for (3) and (4).⁸

The serious problems of the retirement pension system are all financial. Within the social security system, most of the problems could be solved by simply raising the retirement age while strengthening the disability provisions. What is so magical about the 65 age chosen so long ago when few people lived that long? OASHDI buttressed by SSI now provides an adequate subsistence income which was all it was designed for. Privately provided pensions are a bonus comprised of postponed earned income as an alternative chosen by joint agreement between employer and employee. Where collective bargaining provided a watchdog on the employee's behalf, pension administration was generally sound except where the industry declined too drastically or the union and management were jointly corrupt. Landrum-Griffin set up an additional government watchdog for the latter case. ERISA became an expensive

necessity where no entity was available to watch out for the workers' long-term interest. Modest tinkering can shift the cost burdens around until they are more equitably shared but probably can't reduce them substantially. The major issue at present is not addressed by the law: who owns the funds allocated to pensions rather than to current pay, then found to be larger than needed to meet pension commitments? Once again, litigation is a dull tool and collective bargaining a sharp one for kindling such controversies.

The great failure of the U.S. income protection system is its inadequacy to confront a problem never anticipated by its architects: the single parent family. The Social Security Act was designed to protect the nuclear family against the demise of the extended family. We still haven't a solution for the fragmented family. There probably never will be a satisfactory solution. A combination of a more adequately funded WIN, JTPA and Workfare, buttressed by wage subsidies for the working poor and a massive child care effort is probably the best we can do with a problem which is social before it is economic. This is another arena for selective, multi-tiered services. Involved are many women with limited ability and a myriad of personal problems. There are also many of great potential whose only obstacle was a too early liaison with the wrong male resulting in single parent status combined with inadequate education and training. Help must be individually tailored to need and potentials with substantial investment justified in promising cases.

The Status of Worker Protection

What does the assessment of a pluralistic worker protection add up to? First, it was never intended to be anything but pluralistic. That is a strength, not a weakness. New needs and problems constantly arise and are addressed, first in the

economic arena between employer and employee where that is possible and then in the political arena where it is not. A great mystery is why U.S. workers have not been more inclined to take advantage of the protective umbrella of collective bargaining. But that is their choice. A carefully worked out policy keeps that option open within the politically sensitized wings in emphasis deliberately built into the system. Litigation and NLRB decisions may be jointly the way toward unionless concerted activity which can work only if there is a strong labor movement standing by as a threat for the employer to compete against.

Secondly, overall we haven't done too badly through a pragmatic, disorderly system. Direct government protections have been provided primarily in areas where private employer-employee negotiations could never meet the need. The political give and take seems capable of providing adequate protection to the politically potent through constant tinkering and readjustment. Mistakes are made but one of the advantages of the tinkering approach has been that the mistakes have been generally as small as the gains. Only when we make radical departures such as those of 1981-82 do we tend to get into serious trouble. We will be a long time paying for the excess tax cuts and, to a lesser extent, the over-large military commitments.

Finally, where we have never done well is in responding to the needs of the politically impotent. There have been brief moments of expressed concern and feeble attempts at remedy. But by and large, only those get protected who can demand protection. Perhaps by definition that phenomenon is outside the boundaries of the worker protection system.

Notes

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⁴Statement of Dorothy A. Walsh, Government Affairs Director, American Society for Training and Development, before the U.S. Congress, Senate, Finance Committee, July 19, 1985.

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The Distortions of Cost-Benefit Analysis as a Guide to Regulatory Strategy

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Changes in the Regulatory Environment

This didn't happen overnight. The rush to deregulate was industry's answer to double-digit inflation, and its representatives convinced the leaders of both political parties, in the White House and in Congress, that they had a simple way of reducing product costs: reduce the onerous regulations that were sometimes confusing and duplicative, and trust the free market to regulate itself. In the process, the country's leadership forgot that the social regulatory agencies were created in the first place because the free market had failed to provide the necessary safeguards for clean air and water, worker safety and consumer protection.¹

The 'sea change' in regulatory power came about through the efforts of Presidents Jimmy Carter and Ronald Reagan, who both attempted to increase the hegemony of the president over the executive branch regulatory agencies. Carter designed the blueprint, while Reagan followed through with an intense commitment to accelerating presidential domination and providing regulatory relief to industry. Shortly after he came to office, President Reagan issued Executive Order 12291, modelled after President Carter's EO 12044, granting the Office of Management and Budget (OMB) superagency status over regulations, and mandating economic analysis from the executive branch agencies. It was not a bad idea on paper, but

the implementation of the order resulted in vast numbers of regulations being blocked, quashed or put on permanent hold. The order also had a chilling effect on regulation writing, leaving agencies fearful of issuing new regulations or of introducing too many regulatory initiatives--whether they were needed or not.

Not surprisingly, all too many of the regulations that disappear into what some call the "black hole at OMB" involve public protections--environmental, worker safety, pure food and drugs. In the fall of 1983, for example OMB temporarily withheld an OSHA regulation restricting worker exposure to the pesticide ethylene dibromide (EDB). Congressional testimony and court cases have revealed that OMB does much of its regulatory oversight work behind closed doors, meeting privately with industry representatives, and then quietly killing--or forcing the agencies to kill--offending regulations.

OMB's regulatory oversight role remains virtually unknown to the general public, insulating the agency from the kind of political pressure that would moderate its activities. Since many also forget that OMB represents the White House, the president also remains insulated from public accountability for policies--like EDB--that result from presidential efforts to force social deregulation.

OMB justifies its position as superregulator in terms of its primary mission: budgetary constraint and fiscal austerity. Almost any social policy running this gauntlet is bound to reach a pre-ordained outcome, and regulatory policy is no exception. But now there is a respectable methodological rationale: cost-benefit analysis. Reagan's executive order placed heavy reliance on cost-benefit analysis, with informational requirements spelled out in great detail. Agencies were directed, for example, to develop new regulations involving the "least net cost to society," and discouraged from taking regulatory action at all unless the "potential benefits to society...outweigh the potential cost to society." Additional requirements mandated that if an

agency wished to issue regulations it had to submit impact analyses justifying that the benefits exceeded the costs.

As a tool to rationalize regulatory policy, cost-benefit analysis gave the appearance of neutrality. In reality, the method reflected its masters; a study issued by the Congressional Research Service concluded that the single most important factor determining the outcome of a cost-benefit study was its author.² When the authors are also political appointees, the results become even more predictable.

As the primary practitioners of cost-benefit analysis, OMB analysts used cost-benefit analysis to impose an economic grid on social policy, often an impossible task when it came down to the hard decisions involving life, community health and regional stability. It was not the theory itself that created distortions, but the way in which it was subjected to manipulation. The method was window dressing to the deregulation of social protections, a policy that acquired great credence in the middle 1970's, and continues to enjoy substantial legitimacy to this date. The net effect of the wholesale application of cost-benefit analysis to regulatory policy led to the reordering of national priorities from clean air and water, a safe workplace and consumer protection, to the more politically immediate values of the marketplace. It also marked the ascendance of economists in the policy process, who conducted a form of regulatory oversight that habitually subordinated the technical and legal judgment of the agencies to a different perspective.

The Cotton Dust Case

The cotton dust regulations represented only one of many health and safety issues subjected to the standards of cost-benefit analysis, and its history reflects the unique involvement of the three branches of government. Sadly, for the vast majority of regulatory issues, there is little likelihood of the

kind of public debate that opened up the regulatory issue to public scrutiny.

The landmark cotton dust case came as a shock to the yet unchallenged regulatory "reform" movement, which by that time had become almost synonymous with the imposition of cost-benefit analysis to social regulation.³ By refocusing attention on the requirements of the statute, the Supreme Court forced decision makers from their economic gridlock back to legal basics. Even though economists who rose to dominance in the Carter and Reagan administrations paid lip service to the phrase "unless specifically prohibited by law," they tended to pressure agencies to utilize cost-benefit analysis regardless of legal constraints, often disregarding the clear intent of the Congress. In fact, in oversight hearings on EO 12291 before a House of Representatives subcommittee two White House officials in charge of regulatory reform were unable to identify legislation that either prohibited or allowed cost-benefit analysis. During the congressional hearings on the Reagan regulatory reform program, specifically Executive Order 12291, two of the order's principal architects demonstrated occasional ignorance of which statutes required cost-benefit analysis, and which specifically prohibited it. A few extracts from the hearings indicate the embarrassing result:

Dingell: Can you tell us...whether you did any research to find out which of these (acts) were subject to this cost-benefit analysis and which were not, before the orders were issued?

Miller: The answer is no.

Dingell: Well, you seem to be in the rather anomalous position of having an order which you defend vigorously but not being able to tell us who might think on the basis of their own research that it applies to them.

At the same hearing, which followed the Supreme Court

decision, the Reagan appointees still insisted with total disregard of the court decision that cost-benefit analysis would be applied to OSHA regulations.

Gore: Are you going to insist that OSHA apply a cost-benefit test to new regulation issued pursuant to section 6 (b) 5 of OSHA?

Miller: Yes...in the following sense: first, to the degree that the decision is relevant...and, second, the executive order requires certain analyses be done with respect to the lowest-cost way of meeting any given objective.⁴

The cotton dust rules first came under siege during the Nixon administration when OSHA Administrator George Guenther sent a memo urging his GOP bosses in the White House to use the threat of a "Democratic-imposed cotton-dust standard" as a means of raising contributions for President Nixon's reelection campaign.⁵ The pattern of presidential intervention continued for the next decade; the clout of three presidents proved to be a formidable obstacle in the path of resolving the issue. Not as crass, but just as political, officials in the Carter administration also tried to use the cotton dust rules to curry favor with the textile companies. This set them on a collision course with the administrator of OSHA, Dr. Eula Bingham, whose personal commitment and professional background in public health enabled her eventually to prevail over White House economic advisers who regarded cotton dust standards as inflationary. Secretary of Labor, Ray Marshall, was also instrumental in convincing the President to withdraw his opposition to the cotton dust rules. In the meantime, Carter's attempt to intervene to modify the standards to favor the textile industry created an unexpectedly intense reaction from labor unions and public interest groups. From that time on, Carter was careful to cover his tracks when he intervened in

a regulatory decision.⁶

Carter's advisors, reflecting the arguments later used by the textile industry in their arguments against OSHA, argued that the proposed engineering standards were too costly and the health benefits too low to justify the regulations. They favored regulations that set broad performance standards, allowing industry to decide how to address the problem rather than defining the specific actions to be taken. The results would be the same, and the costs would be considerably less, they argued. Instead of forcing industry to install expensive engineering systems, companies would be allowed to formulate their own methods. The textile industry favored techniques requiring workers to wear respirators to reduce exposure to cotton dust in the workplace.

OSHA rejected the respirator idea, arguing that respirators caused severe physical discomfort as well as safety problems of their own. Workers already afflicted with lung disease were unable to wear respirators at all.⁷ Besides, the agency added, it was unfair to put the burden of compliance on the workers who were not responsible for the poor quality of their work environment.

A compromise was finally struck between OSHA and the White House, and the regulations went forward in 1978. Nobody was happy with the compromise, neither the textile industry nor the labor unions, and both groups took their objections to court. In fact, the industry based its entire case on cost-benefit analysis, claiming that OSHA's standards were invalid because the agency had not shown that the costs of compliance (\$656.5 million by OSHA's estimates) were justified by the benefits.

The struggle illuminated the deficiencies of the implementation of the cost-benefit standard as the sole criterion for regulatory decision making. White House economists, for example, in weighing costs against benefits invariably tipped the scales in favor of costs, ignoring other forms of analysis--political,

demographic, scientific--in their scheme. They also neglected in the process to factor in the costs of inaction: increased illness, for example, would surely lead to lowered productivity and increased medical expenses over the long term.

In any case, the limitations of the cost-benefit standard became even clearer when the data gaps emerged. On the health risks, for example, widely disparate views appeared on both sides. The textile industry claimed that byssinosis--or brown lung disease--wasn't all that serious; that only two percent of the workers were affected by cotton dust; and that the disease was easily treatable if caught in its early stages.

OSHA disagreed. The agency's studies showed that brown lung disease was common among textile workers, and in its most disabling forms had afflicted at least 35,000 employed and retired cotton workers. More than 100,000 more still suffer from less severe forms of the disease, while one-quarter of the 864,000 people currently employed in cotton production are exposed to cotton dust.

One year later, the United States Court of Appeals for the District of Columbia upheld the regulations, with Chief Judge David L. Bazelon writing the opinion. Citing medical journals, government studies and legislative testimony, Judge Bazelon bridged the data gap. Byssinosis, he wrote, is the most serious health hazard for cotton workers...when byssinosis reaches its advanced stage, the worker exhibits the symptoms of emphysema and chronic bronchitis. Ultimately, irreversible lung damage results.⁷⁸

While the case was pending before the Supreme Court, the Reagan administration took office. The time was ripe for another presidential intervention in the name of cost-benefit analysis. The Reagan administration, unencumbered by obligations to labor unions, OSHA officials and public interest groups committed to the cotton dust standards, asked the Supreme Court not to review the case, but to send it back to the Department of Labor for reconsideration in light of the President's

regulatory reform policy. In effect, the executive branch in an unprecedented action, was asking the court to withdraw its exercise of judicial review in favor of a presidential policy—cost-benefit analysis. The Reagan administration was heartened by a similar decision handed down the year before—in which the Supreme Court struck down OSHA's standards regulating the chemical benzene—and expected to reap the benefits of that precedent.⁹ In the benzene decision, the court held that OSHA had not justified the new standards by showing that there was a significant health risk, nor had it demonstrated that the standards were feasible technologically as well as economically.

The Supreme Court rejected Reagan's request and upheld Judge Bazelon's decision. The OSHA statute, wrote Justice William Brennan for the majority, allowed the agency to protect the public against health risks "restricted only by technological and economic feasibility," a more flexible criterion than cost-benefit analysis, as interpreted by the political leadership.

Justice Brennan's reminder that "Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of the worker's health above all other considerations save those making attainment of this 'benefit' unachievable" restored some of the balance between Congress and the president in the implementation of legislation. The application of cost-benefit analysis to increase the discretionary power of the executive branch in this case—as in many other instances of regulatory power—distorted the intention of the Congress, as well as the equilibrium between the two branches. Drawing heavily from the Act's legislative history, Brennan's decision made the subordination of cost-benefit analysis to legislative intent very clear: "any standard based on a balancing of costs and benefits by the Secretary (of Labor) that strikes a different balance would be inconsistent with the command set forth in the statute."

The Feasibility Standard as an Alternative

The concept of feasibility enabled the court to reject industry's claims in much the same way OSHA had earlier rejected the union's proposal for more stringent standards on the grounds that the proposal was not within the "technological capabilities of the industry." Feasible meant capable of being done, executed or effected. OSHA was not under any obligation to consider the ratio of costs and benefits while it was still feasible to refuse health risks, said the Court.

Interestingly, the textile industry never really argued that reducing the risks from cotton dust was not feasible; only that it was expensive. Indeed, it did not appear that any of the petitioners feared going out of business as a result of cleaning up their workplace. What they feared, was a future without the cost-benefit criterion: or, a "serious misallocation of the finite resources that are available for the protection of worker safety and health."

How finite? To some extent, Congress and the courts agreed with the textile industry. The workers would not be protected if their employers were put out of business. Where Congress and the courts diverged from the White House was in their broader interpretation of degree. Some businesses would suffer economically from the imposition of cotton dust standards, but that was to be the price of reducing risk. "Standards do not become infeasible simply because they may impose substantial costs on an industry..." wrote Judge Bazelon. "Otherwise the Act's commitment to protect workers might be forever frustrated."

Or any Act's commitment, for that matter. What is there to prevent a president from subverting the intent of any piece of legislation with which he disagreed merely by imposing criteria that create obstacles in the path of statutory goals? Ultimately, the feasibility standard resulted in a more humane calculus than

the cost-benefit ratio, which too often locks decision makers into the position of quantifying the impossible. The Secretary of Labor recognized this, said the Supreme Court, in "realizing that any meaningful balancing between costs and benefits involved placing a dollar value on human life and freedom from suffering."

In the final analysis, the court did not decide among competing theories of policy making, but among competing interpretations of the role of OSHA. The power of the Court is derivative, superceded by the intent and the laws of Congress. But because neither the intent nor the laws are crystal clear, the Court serves an important function in reconciling the actions of the executive branch with the policy directions set by Congress.

What was significant about the cotton dust decision was not that the Court rejected cost-benefit analysis (it did not) but that it raised questions about the legitimacy of its application in all areas of regulation. "When Congress intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute," wrote Justice Brennan. The implications of the Court decision were both far-reaching and, to a certain extent, confusing. Did the decision intend that when Congress meant cost-benefit analysis to be used as a decision making tool it would have to be stated clearly in the statute or it would be prohibited? Or would the prohibition also have to be clearly stated? What impact would this have on both the executive orders of Presidents Carter and Reagan—neither of which has been put to a comprehensive judicial test—which superimposed cost-benefit analysis on agencies except where specifically prohibited?

What was left unanswered by both the Court decisions and the legislation is what would happen if the choices were harder: if they were presented in the form of their logical extremes? What if the textile industry were so marginal that the imposition of the cotton dust standards would bring about its extinction? At what point, if any, is it worth sacrificing the health of a

certain percentage of the workers to the health of the industry? What if it were not 'feasible' to protect the health of the worker and the health of the companies? What then? Who sacrifices: the worker or the industry?

Neither the feasibility nor the cost-benefit guidelines provide an answer to those questions, and the Court enjoyed the luxury of deciding the case with the comfortable assurance that "although some marginal employers may shut down rather than comply, the industry as a whole (would) not be threatened by the capital requirements of the regulation." In that sense, perhaps even cost-benefit analysis, with the benefits properly quantified, would have led to a decision to uphold the cotton dust standards, especially when the health costs of not regulating became sufficiently apparent to establish their correct weight in the equation.

How Theory Drives Policy

In spite of its impact at the time, the Supreme Court decision on cotton dust appears to have had little impact on patterns of regulatory decision making under the Reagan administration which continue inexorably to rely heavily on the cost-benefit calculus to deregulate the social environment. Congress, for example, has changed considerably from the heady days of the early 1970's, when a favorable social and economic climate made it possible for progressive social goals to be written into law. Indeed, Congress' commitment to cost-benefit analysis is regularly expressed in drafts of regulatory reform legislation, submitted each year since 1978, which virtually replicate President Reagan's executive order. All versions of the proposed legislation mandate a series of complicated steps of requiring agencies to do extensive and detailed cost-benefit analysis before issuing regulations. Adding these steps to agency procedures creates obstacles that virtually guarantee a dignified

burial for many new regulatory policies, and contribute to the already weakened state of the Federal agencies.

Add to the congressional legitimization of cost-benefit analysis the clout of two Presidents and their executive orders, and the theory's hegemony over the policy process becomes almost complete. All told, it spells an era of minimal regulation, even when the law clearly states otherwise. And, indeed even when the courts ruled otherwise, executive power countermanded the decision. Within weeks after the Supreme Court handed down its decision on cotton dust, the Reagan administration's OSHA director, Thorne Auchter, ordered the withdrawal from circulation of two publications and a poster warning workers of the health hazards of cotton dust. His reason: the literature no longer represented agency policy.

The President and Congress reflected the political power of groups that brought cost-benefit analysis to the forefront of the policy process, once again affirming the axiom that those who dominate the formulation of an issue also dominate the end. The groups that promoted cost-benefit theory determined how it would be applied; they also formed the nucleus of a political leadership that successfully compressed the issue of social regulation into an artificial set of guidelines, as restrictive in their own way as the regulations they sought to reduce. In so doing, they were able to construct a scheme that looked neat, appeared to factor in all the options, and seemed neutral to the naked eye. Reducing policy to numbers made people feel comfortable; the process gave a sense of clarity to issues that had heretofore defied easy definition.

Despite rare challenges like the cotton dust case, current trends indicate the growing respectability and receptivity to cost-benefit analysis as a dominant regulatory tool. This is largely due to the substantial political clout of its proponents, which far exceeds that of its critics, allowing its advantages to reach the public without anywhere near equal time for its disadvantages. Moreover, the vagaries of the economy convey

an immediacy that renders short-term cost factors more acceptable and more urgent in the policy arena than long-term health and safety risks, and narrows the criteria for public intervention to the framework of cost-benefit analysis. In its application, the method has become even more circumscribed than when the public sector enjoyed the dividends of a buoyant economy.

In fact, when transposed to the public sector, cost-benefit analysis often turn out to be nothing more than cost-analysis, a simple accounting of the costs of doing business. Basically, this form of analysis derives from the profit and loss ledgers of the private sector, where costs and profits are balanced out each year to determine the fiscal health of a company. The benefit side of the equation, the firm's profits, are easily measurable, unlike the benefit side of public policy. In the private sector a firm's obligations rest primarily with its own well-being, and only secondarily with society or the well-being of its employees.

That is the job of the public sector: to worry about what happens when the firm's efforts to maximize profits result in harm to society. The government is there to restrict the firm's freedom when the effects of doing business "spill over" into polluting the environment or creating hazards in the workplace. In that context, the government quite legitimately puts its emphasis on the social costs of industrial practices in its efforts to regulate the private sector.

The problem is that on the government side, clear-cut statements of profit (benefits) and loss (costs) are extremely difficult to quantify. And so the calculations simply do not get done. Or they are done in a skewed fashion that justifies what the policy makers wanted to do in the first place, namely, deregulate social protections. At that point it becomes easier, as factors conducive to measurement become weighted more heavily than those that elude the calculator. Recent applications of cost-benefit analysis to the public sector reveal their private sector limitations: benefits are rarely factored fully or

accurately into the equation, and costs are more than not calculated for the short term, neglecting long-term productivity and health costs.

Cost-Benefit for Whom

In the debate over regulatory choices, the political protagonists argued that since benefits could not be measured accurately, they should be downgraded in the policy equation. Since evidence of benefits is needed to justify costs, it is easy to see how the cost advocates quickly prevailed over fellow analysts in scaling down the regulatory process.

For before benefits can be measured, they must be identified—a task that has been shunted aside with the same alacrity as their measurement. The genuine identification of benefits moves closer to the crux of the political problem: the struggle over which funds are expended and for whom.

The most common pattern, when benefits cannot be easily measured, is to discard or to trivialize them. "How do you put a value on the view over the Grand Canyon?" asked vice presidential aide Boyden Gray when queried about the methodology in which his administration had vested so much of its resources. It can't be done, but, at the same time, the answer masks the real issues. On the surface, it is easy to agree that it is not really worth the expenditure of billions of dollars to preserve the view over the Grand Canyon for the benefit of tourists and their visual pleasure. Putting the question another way, however, lends a less frivolous cast to the issue. What is it worth to maintain air purity in the southwest? After all, the air mass over the Grand Canyon does not stop at the boundaries of that giant crevice; it moves with the wind currents, and affects vast numbers of people, most of whom are not out enjoying their holidays.

Benefits like the view over the Grand Canyon often elude

cost-benefit practitioners even when they are not trivialized by decision makers like Boyden Gray. These benefits elude measurement because they are often indivisible: if one person benefits, all benefit. How can one measure benefits like clean air and water, good health, a minimum of pain, economic stability, wilderness preservation, and national defense? Because of the difficulties of measurement, very few researchers have attempted to measure benefits; a notable example is Nicholas A. Ashford, of the Massachusetts Institute of Technology. In a valuable study prepared for the U.S. Senate Governmental Affairs Committee, Ashford concluded that "the American people save billions of dollars each year as a direct result of federal regulation in the areas of health, safety and the environment."¹⁰

The benefits in question are referred to as "public goods;" they are non-purchasable, and for that reason, no single group can enjoy their special protection. For that reason, they also lack defenders, a political problem that recurs continually in the regulatory arena.

The trend toward downgrading benefits also leads to the question of cost-benefit for whom? Who are the true beneficiaries of public policy tilted toward the cost side of the cost-benefit equation? The polluters are the definite victors in the battle to dismantle EPA: they have increased their short-term profits and decreased their capital expenditures for antipollution equipment. The strip miners in Appalachia have emerged the winners in the recent reorganization of the Office of Surface Mining, a bureau now less inclined to enforce federal legislation preventing the gutting of the land. And if the court had not stepped in, the textile industry would have been counted among the victors in the battle over their notion of benefits, namely, profits versus the health of their employees.

In one of its more enlightened periods, Congress recognized the political conundrums of social regulation, among the fallacies of cost-benefit analysis. With specific recognition of

its inadequacies in providing equal weight to benefits, Congress prohibited the calculation of costs in certain pieces of legislation. In addition to the legislation creating OSHA, Congress also required 'unbalanced' decisions in the Clean Air and Water Acts, as well as other legislation in the social regulatory area. In that way, Congress protected the agencies from succumbing to the familiar pattern of the "captive agencies," those economic regulatory agencies whose officials often became too closely tied to the industries they were responsible for regulating. Implicitly, Congress was also recognizing the different time horizons distinguishing the public and private sectors, with government more willing to build in protections for future generations.

Rebuilding the Equation

In lieu of costs and benefits, there are other questions that are rarely asked by the current practitioners of regulatory policy. Judge David Bazelon whose decisions have consistently stood well ahead of his time, addressed some of them. "The efficiency label," he wrote, "may frequently mask special benefits for special interests. The real questions should be more qualitative ones. Who will be affected? In what ways? On what basis are these predictions made?"¹¹

Invariably, those who ask the questions get first crack at making the choices. With cost-benefit analysis the marketplace essentially makes the regulatory choices, since it is its needs that are addressed and given priority, and its information that form the basis for decisions. Time after time, the marketplace has exaggerated the costs and minimized the risks, even though both categories often fall in the realm of the unknown. In the cotton dust case, industry argued that brown lung disease was reversible, that it affected an infinitesimal percentage of the workers, and that controlling it would place an unfair burden

upon their companies. It took two outside consulting firms, employed by OSHA, as well as the separate evaluation of that evidence by two levels of federal courts to reflect industry's contention.

Not every regulatory decision gets the benefit of that kind of scrutiny; more often, industry data are the only game in town, and heavy reliance is placed upon their findings. Even when the data are essentially correct, the interpretation of them can distort the conclusions.

Not only are there gaps in the available data, but there are vast realms in which the data needed for intelligent regulatory decisions simply do not exist. Cutting the EPA research budget in half, as President Reagan did in his first year in office, merely exacerbates the problem of the data gap: it will ensure less regulation, because the agency cannot regulate without research. Meanwhile, over sixty thousand chemicals have now been identified with an additional one thousand added each year. Few of these have been adequately researched - their effects often unknown until years later. Still, the public risks their release into the environment with uneven protection from the public sector. The effects of the synthetic hormone DES (diethylstilbestrol), given to pregnant women to prevent miscarriage, were not known until twenty years after their prescription; the drug failed to prevent miscarriage, but has since been related to cancer in the offspring of those who unwittingly took the drug. In this case, the drug companies did not know the effects, since no benefit or risk data were available.

The tendency to ignore the unmeasurable in the cost-benefit calculus shifts many of these regulatory decisions to the courts, where the limits of the law parallel those of science. "The role of the court," said Judge Bazelon in an interview, "is to ensure that proper procedures have been followed and that the agencies utilize the best available data before issuing regulations. Agencies should announce in words of one syllable what they've done, and why they're doing it. The problem is that there are

deep uncertainties. In Vermont Yankee (a case involving nuclear waste), the Nuclear Regulatory Commission gave us only in-house experts. They said in one hundred years we'll have the answer. I said their procedures were inadequate. There was no cross-examination, for example. I was reversed. There weren't enough smart people around in 1973 to know disposal would be a problem. The record was inadequate because there were inadequate opinions."

Facing the unknown also leads the more extreme among the free market advocates to argue for less regulation on the grounds that liability laws will protect the public from irresponsible corporate behavior. Given the condition of uncertainty surrounding this body of law, their assessment is unfair from the public's point of view as well as the private sector's. "Such uncertainty makes a finding of negligence liability unlikely, inappropriate, and therefore ineffective in protecting society from these dangers," argued Judge Bazelon.

For liability law to have some effect, blame must be attached to an individual or to a company. Very often, it is impossible to trace a pollutant to its source; more often, its effects may not be felt for years. Even if the source can be determined and blame properly affixed, the company may long since have gone out of business and be unable to pay damages. In addition, a company may also have fully protected itself from subsequent legal damages, as did the Hooker Chemical Company when it turned over the Love Canal property to the local school board, which was duly warned of the health hazards. Witness also the decision by the Manville Corporation, the nation's largest asbestos producer, to file for bankruptcy protection to avoid seventeen thousand asbestos-related damage suits.

Who pays for the consequences of these acts? In the case of Love Canal, the government of New York State, aided by the federal coffer, paid the damages for the private sector. In the case of the asbestos manufacturers, the jury is still out, but discussions among members of Congress involving the creation

of worker compensation funds indicate that the government once again will probably step in to pick up the tab.

To be fair, companies may innocently produce products whose toxicity may be uncovered at a much later date. If they remove these products from the market immediately after their hazards are revealed, as Proctor and Gamble did following reports linking the Rely tampon to toxic shock syndrome, should the company then be liable for damages in the thousands of legal suits that now plague them? No one really knows the answer, but recent evidence shows that juries are more sympathetic to the plaintiffs, spelling potential financial disaster for many manufacturers.

What of the less responsible companies - the fly-by-night operations polluting the air and water - who are as elusive to prosecutors as the chemicals they leave for society to clean up? The midnight dumpers, who leave toxic wastes in dump sites of their own choosing, are as difficult to apprehend as they are to identify. How do liability laws protect the public against them? Once again, the government ends up paying for the cleanup, but should this be included as a cost of regulation? Any cost analysis would show that careful regulation and enforcement at an early stage are much cheaper than cleanup costs later on. Not to mention the health costs, which are rarely factored into the equation.

In the final analysis, the dominance of cost-benefit analysis over regulatory policy shunt aside the management of risk and negates the government's role in managing risk. Although we cannot achieve a risk-free society, government is the only agent with the capacity to protect the public against untoward risk, and it remains the only agent whose purpose is to protect the public. Industry cannot be trusted to make these determinations, and should not be accorded the legitimacy to make those decisions. The task of a firm is to make profits, not public policy, and there is no justification to fault its social consciousness if it neglects to weigh considerations other than self-

promotion. It is up to the regulatory system, with guidance from Congress, to make policy decisions and to provide the constraints necessary to preserve the public's interests. Moreover, the political system, unlike the private sector, makes its policy in the open; its deliberations are guaranteed by law to be open to public debate and to public view. Though often flawed, its policies are also open to change, when change is warranted.

Although cost-benefit analysis can be useful in determining the most cost-effective alternative among competing regulatory devices, it should be laid to rest as a dominant policy tool - as inadequate, inequitable, and subject to excessive political distortion in its application. In the private sector, it has led to discussions and decisions of chilling proportions, such as the decision to market the Pinto, which weighed profits against safety in designing an automobile.

Regarded as irresponsible in the private sector, this kind of decision making has no place in the public sector; indeed, it is surprising that it has achieved the level of respectability it enjoys today. Ultimately it omits the human factor, with unfortunate results for those who count on government protection. As a victim of industrial lung disease testified: "Dying is a tough way to make a living."

Footnotes

¹ Much of the material for this paper was drawn from ch. 4, "Particles of Truth - Cotton Dust and Cost-Benefit Analysis," *Dismantling America - The Rush to Deregulate*, by Susan J. Tolchin and Martin Tolchin, Boston: Houghton Mifflin, 1983; Oxford University Press, 1985 - paperback edition.

² Martin Tolchin, "Regulation and the Economist," *The New York Times*, November 20, 1983.

³ *American Textile Manufacturers Institute vs. Donovan*, 101 U.S. 2478 (1981), pp. 5.

⁴ "OMB: The Role of the Office of Management and Budget in Regulation," House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, June 19, 1981, pp. 149-50.

⁵ "Perspectives on Current Development: The Cotton Dust Case," *Regulation*, January/February 1981, pp. 5.

⁶ Susan J. Tolchin, "Presidential Power and the Politics of RARG," *Regulation*, July/August 1979, pp. 45.

⁷ 43 Federal Register 27, 384 (1978).

⁸ *AFL-CIO vs. Marshall*, 617 F. 2d 636 (1979), pp. 13-14.

⁹ *Industrial Union Department vs. American Petroleum Institute*, 440 U.S. 607, 100 S. Ct. 2844, 65 L. Ed. 2d 1010 (1980).

¹⁰ U.S. Congress, Senate Governmental Affairs Committee, "Benefits of Environmental, Health and Safety Regulation," Senate Committee on Government Affairs, March 25, 1980 (Washington: U.S. Government Printing Office, 1980) and Nicholas A. Ashford, "Alternatives to Cost-Benefit Analysis in Regulatory Decisions," *Annals of the New York Academy of Science* 363 (April 1981), pp. 129-38.

¹¹ David L. Bazelon, "Science and Uncertainty: The Regulation of Health Risks," paper delivered at the Health Policy Forum, Harvard School of Public Health, May 4, 1981, pp. 7-8.

The Role of OMB

by

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I appreciate the opportunity to present my personal views and to some extent to extrapolate from some of the events stemming from the documents and guidelines coming out of OMB which we expect will contribute to a better regulatory process. I can try to give you an indication of where we think we're heading with regard to some of the regulatory processes and our perspective on some of the Labor Department activities that we think are vital, that we think should be pursued with the utmost vigor. Most of these are in the area of OSHA, particularly in the area of worker health protection.

Sar indicated, when I discussed the presentation with him over the phone, that you were primarily interested in some of the program planning processes that are now underway in OMB, primarily the regulatory planning process. With that in mind, I would like to give you an overview of where I think that planning process can help in the area of overall regulatory management, oversight within the agency and across federal agencies, and can assist OMB in perhaps doing a better job in terms of our regulatory review process.

As you know the importance and the need for justification and evaluation of the likely impacts of regulation is not new. Many previous administrations have recognized the problems associated with effective regulatory management. With this new executive order and its associate processes, OMB is attempting to identify more appropriate data and more appropriate criteria that would help make better decisions in the regulatory arena. I think we're moving in that direction with the new

Executive Order 12498 which will result in extensive review and documentation of each individual regulatory action likely to be proposed within the next fiscal year.

I had the opportunity under the Carter administration to work in the regulatory analysis group in OSHA. We saw there a decided change in the scope and comprehensiveness of the evaluation of regulatory activities and in our ability to assess the likely impacts of regulatory activities, both the reduction in risks and the possibility of incurring costs in the private sector. I think, although it put a tremendous burden on the agencies that was not there before, that we found that better decisions were made and better priorities, perhaps, were being set within the agencies as a consequence of the efforts in this area.

This administration has presented two executive orders, 12291 and 12498. Both are complementary tools in the oversight and management process. Executive Order 12291 merely requests that the affected federal regulatory agencies provide: a justification of the need for a regulation, an identification of some of the likely benefits, an assessment of the effectiveness of all viable proposed alternative regulations, and the agency's evaluation of the costs of the alternatives. We recognize at OMB that evaluation of benefits and costs can be an heroic endeavor. In many cases, it is an impossible task. For example, in the area of chronic health problems, trying to quantify the anxiety and the pain and suffering that go with the cancer-induced illnesses is tremendously difficult and is not even something that we would expect an agency to provide. We recognize the problems with the benefit estimation in the health area. In some cases we are just starting to recognize the hazards; with reproductive hazards, for example, it is impossible to try to quantify benefits or conduct any type of risk assessment without appropriate data. In many cases we simply do not have appropriate data. So we recognize the shortcomings of doing a traditional cost-benefit analysis in an OSHA-type environment or a MSHA-type environment. MSHA is moving more

extensively into the health area than they have been in the past and we recognize the assessment difficulties that such a move will entail.

Nevertheless, I think it is important to try to focus in on those elements that we can identify as to the likely impacts, whether or not they are quantifiable or not quantifiable. We would expect the agency at least to identify nonquantifiable effects, discuss them, and present them to the public as likely results of the particular regulation.

We must also ask the appropriate questions, and this came up in the hazard communication rule which is designed to provide more timely, more accurate health information to employees, employers, and supervisors. The task before me at the time was how does one identify and quantify benefits of timely, accurate information. What are the responses of workers to better information? Will they respond to better information? How will supervisors respond to better information? What are the implications for litigation in this area? What are the implications for worker's compensation? What thrusts might come from additional worker's compensation requirements? Once you have all the parameters, or you suspect you have all the parameters, for an assessment, the next question is how do you quantify that in terms of likely reduction of injuries and illnesses, given that we have an injury/illness data base that is rather weak, particularly for chronic illness. At best, you reach satisfactory answers that are somewhat subjective as to the likely effectiveness and the likely benefits of that rule--everyone has a different opinion as to the likely effectiveness and likely benefits of that rule.

Was it healthy to have the exchange with OMB and the exchange with the public. I would emphatically say yes, despite the pain and suffering that went with it as an economist at OSHA, for two reasons. One, it forced us within the agency very quickly to hone in on the important aspects of the decision making process which was the justification for the regulation:

adequate evidence for the need for regulation, evaluation of costs, evaluation of benefits, and focus on the decision making parameters that would be important, including risk assessment, the justification in terms of costs and benefits, the illness/injury reduction, the gamut. OMB forced us to try to craft our arguments to present a rigorous assessment to OMB. I think we adopted a better regulation as a consequence of that OMB review because every piece of it underwent tremendous scrutiny throughout the agency.

The second issue that I think was helpful was that it forced the public participants, and there are many who were interested in this--it was a regulation that affected virtually all of manufacturing and is about to be rolled out into other areas--it forced the participants to also focus on the important parameters of the decision making process. If one looks at the rule making record and reads through some of the testimony that is presented in some of these rule makings, very little evidence is actually submitted. Industry participants, for example, traditionally present assertions and opinions that the regulation is too costly without any evidence, any substantiation of their concerns whatsoever. And in many cases, any evidence that they submit has no accompanying documentation. There are no sample surveys, no additional data, no linkage to parameter evaluations. And the same problem arises with some of the other participants. Very little effort was spent by the public participants on evaluating alternatives, showing why the alternatives that the agency proposes are perhaps inappropriate, to providing a logical, justifiable and fully substantiated package for the agency to deal with when it comes time for their ultimate decision. To the extent that we can, and OMB is in part responsible for this, we can ask the agency to present the complete assessment package to the public, to force the public to try to deal with that package. As a result, I think we will end up, with better regulatory decision making.

So I think the give and take and the discussions between

OMB and the agencies ultimately will turn into better decision making and better regulatory activities for the public in general.

As part of our review process within OMB on any package that we receive we actively review the public record for that rule. Any comments submitted to that record are part and parcel of our review as well as that of the agency. So to the extent that better information is transmitted to the public record, I think that will make our review better and make our discussions more effective. OMB in many ways serves as sort of a reviewer of a journal article. We can provide questions, we provide suggestions and sometimes we even provide recommendations. But we are not the editor of the journal. We do not make the ultimate decision as to whether or not a regulation goes forward or how it goes forward. We are simply the reviewer and we send forward our recommendations.

In most agencies--and this is a fundamental problem that OMB is trying to correct--there is a cart and horse problem. For many of the regulations that we see completed, the regulatory analysis, the evaluation, the justification is completed long after the regulation is actually crafted and has actually gone through some cursory review process within the agency. We see that as a fundamental problem; one would hope that the risk analysis, that the identification of likely effects, the benefits and the costs, would become an integral part of that decision making process. With some agencies, not so much with the Labor Department, but in many agencies that is not happening. The regulatory evaluation is basically a sales document for the proposal that the agency has determined is necessary before they even began to evaluate alternatives.

OMB can provide some outside review capabilities and raises pertinent questions on options that may or may not have been considered adequately. We try to point out gaps in analysis which will ultimately help us in any legal problems that we may have--and many of the OSHA regulations are boxed up in court. So I think OMB plays a very important role in trying to

fill in gaps, ask important questions, raise alternatives that may be considered that may be less burdensome and equally effective. But our reviewer role is quite important given the cart and horse problem. If, over time, OMB can by its presence in conjunction with some active presence on the part of the agency officials, define more carefully the cart role and the horse role, I think our efforts will be well taken and we will end up with, again, better regulatory decision making.

Many in the public domain suggest that OMB is a black box, and I would suggest to you that that certainly is not the case and frequently, working there, one thinks it's a glass house. Everything we do in OMB we know is subject to public scrutiny. We frequently do not write things down primarily because of timeliness--for a letter to go up through the channels and out the door to another agency can take forever. So frequently we raise our questions or present our alternatives or suggestions to the agency by phone or in person. But we also have a tremendous amount of documented inquiries that we have sent to, for example, the Department of Labor in letters and in public transmissions.

OMB is not a black box; we are very open in our comments and our recommendations to the agencies, and we for the most part have transmitted those in public form and in public letter and in public documentation. So I think the record is very clear particularly in the regulatory program. We invariably are responsive to the public comments. To do otherwise is a complete violation of all of the codes that go with the rule making process. We review the public record, we will look at the comments and try to give credence where evidence is presented that seems to warrant credence. We cannot and we will not depart from the evidence submitted in reviewing of the public record. We get together with the agency and exchange our ideas and see what might come out. We are however, as much bound by the public record as the agency.

The regulatory planning process is an attempt to urge the

agencies to better manage internally their regulatory processes and more importantly, to provide the public with a full breadth of information. To an extent in the Executive Order 12291 we are urging public participants to provide better documentation more evidence, better substantiation of their concerns rather than vague assertions and opinions, we also need to give them adequate time to respond. Getting together an evaluation and evidence and doing a sample survey takes a great deal of time. We felt that the regulatory planning process would provide everyone with full information regarding the regulatory activities of any particular department and would thereby give everyone an equal starting point.

Many of the situations that we found in agencies outside of the Department of Labor was that frequently an agency head would meet with a subgroup, such as you folks and announce particular actions. That gave that subgroup a comparative advantage in responding to that action which we felt was inappropriate. They could start their lobbying effort in that particular area, they could marshal their resources, rebut the effort or promote it. We were trying with the regulatory planning process to make sure that that comparative advantage was at least reduced if not eliminated entirely. All public participants will then start from the same starting and they knew full well where any particular Secretary of Labor, HUD, whoever, was intending to go with a regulatory program, what the priorities were, and what the scheduling is expected to be. That helps the public to better allocate their resources and it helps the agency and it helps OMB better allocate their resources. If we are cognizant of the department's priorities, if we know what actions need to have a speedy review, then OMB can provide a more effective review process. I think with regard to the Department of Labor we are trying desperately to work in tandem with them according to their schedule and I think it's going to work fairly well. I think that the regulatory planning process is complementary with the 12291 process. Again, if we

are requiring better information, we have to provide early warning—the regulatory planning process will do just that.

Last But Not Final Word Protecting American Workers

by

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The popular slogan of the day, "get government off our backs," is not new. The issue is off whose back. During the first 150 years of this nation laissez faire philosophy dominated the thinking of American policymakers, and federal action tended to support established groups. Indicative of the prevailing views of government action was a Supreme Court ruling some 60 years ago holding that the District of Columbia minimum wage law was unconstitutional because it left employers "without adequate means of livelihood." The Court displayed no concern for employees required to work long hours at starvation pay. American society tended to accept and support the notion that the government that does least is the best government.

During the Great Depression changing attitudes found expression in the New Deal legislation that established the foundations of today's social welfare system. Federal programs for the unemployed are an example of this transformation in attitudes toward government. Before the 1930's it was commonly held that economic booms and busts were inevitable and that government could not moderate their impact. Since the Great Depression the government has taken a more active role in protecting American workers.

We usually think of the welfare system as applying to others. In fact, the system as it has evolved over the past 50 years touches everyone in some way. One frequently ignored component of this system is federal regulation of the workplace.

The Need for Regulation

Federal intervention in the workplace does not change or ignore the fact that the free market is a powerful instrument for the distribution of opportunity. Left to itself, however, the free enterprise system frequently tilts in favor of those with economic and political clout and does not always function equitably. Once distortions have occurred in the system, self-corrective action is at best slow. As someone once remarked, "in the labor market, the invisible hand is all thumbs."

The push for a federal response to perceived market inadequacies has evolved into two major stages. The New Deal legislation reflected both the recognition of longstanding problems and new attitudes about those problems formed during the Great Depression. The initiatives of the 1930's did not ignore the principle of subsidiarity--that a higher level of government should not do what a lower level can accomplish--but recognized that competition among the states might prevent each of them from taking corrective action. It was further recognized that concerted national action was required to deal with the underlying problems that had been exacerbated by the Great Depression. States and localities were not in a position to combat the problems of mass unemployment and deprivation then prevalent throughout the country.

A generation passed before the nation adjusted to the changes brought about by the New Deal. The second wave of reform, marked by the legislation enacted during the Great Society era and the first term of the Nixon administration, responded to a new set of issues--the growing struggle for civil rights and the quest for improving the quality of life and work.

Pervasive Impact

The cumulative impact of the changes wrought by these two waves of reform has been pervasive. In one way or another the work life of most Americans has been affected. The federal government now supports programs to help people prepare for work. Federal funds are now the largest source of support, next to the family, for higher education. Whatever the substantive worth of college and post-graduate degrees, they provide the necessary credentials for better jobs in the marketplace. For individuals who have reached adulthood without acquiring either a basic education or saleable skills--either because they failed or were failed by the educational system--the federal government supports institutional arrangements which provide second chance opportunities. Children are protected from premature employment requirements. In addition, employers are proscribed from discrimination against job applicants because of sex, race, age, religion, national origin or handicaps.

Once an individual is in the work force, the federal minimum wage places a statutory floor under the wages to which the worker is entitled, in order to provide a minimal socially acceptable standard of living. Long hours are discouraged by premium pay provisions. During an employee's work life, equal opportunity in promotion is required. The federal government also attempts to eliminate workplace health and safety hazards. Over the years, the increasing use of chemicals and other carcinogens in work operations has increased hazards to worker health. An environment completely free of health and injury is, of course, unattainable, but the government has established rules and regulations which attempt to decrease the health risks faced by workers. Beyond these minimal federal standards, the government protects employees' rights to collective bargaining.

Government intervention continues after individuals leave employment. When a worker is laid off, the government

guarantees temporary income support. On retirement, income support is guaranteed to virtually all persons. In addition to social security, a federal insurance program guarantees that private pensions will be paid in cases where an employer fails to make provisions adequate to pay the promised benefits. Finally, the government pays a major part of the health care expenditures of retired workers, easing their fears that their life savings will be wiped out if illness strikes.

Were the Goals Accomplished?

An even-handed evaluation of the federal interventions in the workplace is subject to numerous caveats. For example, it is impossible to determine what would have happened in the absence of government interventions. It is difficult to distinguish the impact of overall economic changes, demographic or industrial shifts, and many other variables from the impact of government action. The calculus to measure such changes has not yet been designed. A strong inference can be drawn, however, that the quality of life in the workplace has vastly improved as a result of government intervention.

There is little reason to believe that employment opportunities for minorities and women would have expanded to their present level in the absence of federal intervention. Government assistance has made it possible for many in these groups to gain the necessary qualifications and credentials for advancement, and many are now entering professions from which they were previously excluded.

At the other end of the occupational spectrum workers are guaranteed a minimal wage. The mandatory minimum wage has no doubt eliminated some jobs but it also has had positive effects. Analysts largely ignore the fact that the earnings of millions of workers with little clout in the marketplace have been raised as a result of this government intervention. In the

absence of government action the wages of millions remain at or near the minimum wage. The Labor Department has estimated that some 5 million workers received wage increases as a result of the last increase in the minimum wage more than five years ago. Since then, the minimum wage has deteriorated by some 25 percent because of inflation. Without congressional action, the floor on wages will continue to sag.

The workplace is now a safer place because of government intervention. Job-related fatalities have declined and some health hazards have been eliminated. It took a long time, however, for issuance of the regulations requiring employers to inform employees of prospective health hazards in the workplace. More vigorous enforcement and new institutional arrangements are necessary to optimize the effects of federal intervention. It is instructive to compare the present situation with conditions prevailing in the workplace before the passage of the Occupational Safety and Health Act in 1970. The case of asbestosis provides some insights. Conclusive evidence is now available that the major producers of asbestos were long aware of the hazards to their workers but withheld this information from their employees. Asbestos was one of the first health hazards to be regulated by the Occupational Safety and Health Administration. An increasingly affluent and better educated labor force is going to demand that reasonable and affordable health and safety regulations be enforced.

Until the passage of the National Labor Relations Act, most employers denied their workers the right to band together to improve their pay and working conditions. The industrial jurisprudence system that developed as a result of the collective bargaining encouraged by the government ensured the rights of organized workers in the workplace. No longer must employees surrender their civil rights once they enter the workplace.

The federal-state unemployment insurance program reduces the risk of drastic income loss when workers are forced into idleness. The program replaces a portion of lost wages and, in

addition, pumps income into the economy during business downturns, thereby acting as an automatic stabilizer for the economy.

When workers reach retirement age, the social security program protects most elderly families from poverty and preserves their dignity. Half the workforce now supplements social security with private pensions and federal guarantees assure that retirees will receive these pensions even if the company for which they worked goes into bankruptcy or ceases to operate.

All in all, this network of protection provides for both stability in the economy and dignity in the lives of American workers. It also creates expanded opportunities for groups who were previously excluded from participation in the mainstream of this affluent society.

The Reagan Assault

The 1980's witnessed a "rush to deregulate," to borrow Professor Susan Tolchin's apt phrase. This policy reversal was provoked by a changing political climate, slow productivity growth, high inflation, increased international competition, and a desire to cut the costs of regulation. The drive to reduce federal intervention in the workplace reflected a widespread perception that these regulatory efforts had failed to achieve their goals. While retrenchment started during the Carter administration, the Reagan administration has accelerated the process of deregulation, primarily through administrative action. Responding to widespread public support for most of the regulations enacted since the New Deal, Congress refused to repeal existing laws. However, Congress did cut the budgets of the regulatory agencies which reduced their effectiveness. This action coupled with Reagan administration appointees who both reinterpreted the laws and rescinded earlier administrative decisions, resulted in a process tantamount to deregulation.

Mounting case backlogs, increased emphasis on self-regulation by business, and ideological opposition to federal intervention on the part of the administrators effectively reduced the impact of regulations enacted prior to 1980. The Gramm-Rudman law, if it survives constitutional challenges and is implemented, threatens additional drastic cuts in the budgets of the regulatory agencies and is likely to further diminish federal protection of the workplace.

Many employers have continued to abide by the regulations even in the face of lax enforcement. Indeed, many employers have grown accustomed to the federal regulations and have opposed their repeal. A case in point is the attempt by the Department of Justice to rescind President Johnson's executive order requiring employers doing business with the federal government to establish goals and affirmative action schedules for the employment of minorities and women. Furthermore, the courts have on numerous occasions overturned the interpretations of the Reagan administrators and have forced them to comply with the law.

The Swinging Pendulum

The present retreat by the federal government from regulation of the workplace is likely to be temporary. The nation's workforce has not proved willing to surrender existing protections and may seek additional federal intervention. Likely areas for federal action include comparable worth, employment-at-will, and combining work with welfare.

In regard to comparable worth, the evidence is conclusive that women's pay in the labor market is lower than that of males. Some of the pay differentials are based on tradition and are not necessarily a result of outright discrimination. The issue is how to design new policies to make up for past practices. A number of states have taken corrective action as far as their own

employees are concerned, but the federal government has failed to act in protecting its own female employees, although there is considerable evidence that gender-based pay differentials also exist in the federal establishment. Organizations representing women will no doubt press for pay equity measures and, as their clout in the labor market increases, will push the government to take appropriate action not only to correct pay inequities existing in the federal establishment, but to take a leadership role in inducing corrective action in the private sector.

Employment-at-will concerns the right of employers to fire employees. Grievance and arbitration procedures under collective bargaining agreements protect the one-fifth of the work force that is unionized from unjust or capricious firing. The four-fifths of the workforce who are not covered by union contracts, however, are rarely able to challenge the traditional rights of employers to fire workers at will. A number of states have experimented with laws that would provide job security and some protection against firings to employees. Some court decisions have also tended to circumscribe the rights of employers to fire their employees at will.

These employer rights are deeply engrained in American industry, however, and no clearcut proposals have surfaced that would protect worker rights without seriously infringing upon business efficiency. Federal intervention, if any, will have to be postponed until state experimentation and court decisions provide further guidelines for action.

Combining work and welfare, the third potential area for federal intervention, has already been tried. Recognizing that the minimum wage is inadequate to pull many workers and their dependents out of poverty and that there is a need to ensure that work pays more than income support, the Nixon and Carter administrations experimented with programs that provided incentives for welfare recipients to supplement benefits with earnings. In addition, low paid workers were encouraged to maintain their earnings and supplement their income with

transfer payments. Both the Nixon and Carter administrations supported the principle that work and welfare should go together. The Reagan administration has abandoned this approach, but the problem of the working poor persists. The huge federal deficits of the 1980's have discouraged further experimentation with designs to combine work with welfare. The need for such action, however, has not disappeared.

These are just a few of the areas where federal experimentation and intervention is likely to occur. Little will happen, however, until American society reaffirms the positive role of government and insists that the federal government carry out the spirit of the preamble to the Constitution which calls for the federal government to "promote the general welfare." We will then return to the path of stronger worker protections that characterized the years from the Great Depression to the Reagan administration.